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HANDBOOK

TO

THE LABOR LAW

OF

THE UNITED STATES

BY

F. J. STIMSON

DR. NORMAN A. WIGGINS

NEW YORK

CHARLES SCRIBNER'S SONS

1896

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PREFACE

This book is the result of an attempt to set forth, as it exists in the United States to-day, that law of labor disputes and the regulation of industrial affairs and protection of employees which has had its greatest development in the last few years. While it is hoped that the work is sufficiently full and accurate to serve as a legal text-book, the author's chief object has been to make it a clear and trustworthy guide for laboring men and their several organizations throughout the United States. Therefore, though occasionally indicating in what directions future improvement may be looked for, he has mainly confined himself to a statement of the law as it exists to-day. To save space, the words chapter, section, etc., have generally been omitted from the citations of statutes, their absence being indicated by commas; and the references are always to the annual laws of the several States, or to the latest revision in general use. The abbreviation *C.* is used for *Constitution.*

Boston, January, 1896.

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HANDBOOK
TO
THE LABOR LAW
OF
THE UNITED STATES

HANDBOOK TO THE LABOR LAW OF THE UNITED STATES

CHAPTER I

THE LABOR CONTRACT

§ 1. **General Constitutional Right to Freedom of Contract.**—It is a question much discussed, whether there is such a thing as unwritten constitutional right to freedom of contract; that is, whether it has been established as a principle of English liberty that a man may make any contract he choose, not criminal or immoral, and call upon the courts to enforce it. If there is such a right, it may only be forbidden or limited by express act of Parliament in England, and only in this country by constitutions, not by Congress or the state legislatures. Although there are both historic and modern statements of English courts affirming such a right,[1] it is

[1] By Sir J. Jessel, M. R., p. 465 (Printing Co. *v.* Sampson, L. R. 19, Eq., 462).

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void

probable that parliament is in that country supreme;[2] and that these statements are not meant to extend to a case where a statute has been enacted forbidding any special kind of contract before it is made. Important statutes, such as the Irish Land Acts, have been passed

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as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further."

So, in Mitchel *v.* Reynolds, 1 P. W., 181, decided in 1711, the courts say that "restraints of trade, though by grants or charters from the Crown or by laws of towns, etc., are void both as contrary to Magna Charta and the general liberties of the subject. Magna Charta says, 'No freeborn man shall be disseized of his free tenement or liberties, or his free customs,' and the word 'customs' has always been taken to extend to freedom of trade." See also Lord Bramwell's opinion in Reg. *v.* Druitt, 10 Cox C. C., 592, hereinafter, § 57.

[2] Cooley, Const. Limitations, *172; 1 Blackstone, 91. Coke held the opposite opinion; see Bonham's Case, 8 Co., 1186.

in the present century, denying unlimited freedom of contract in special cases. A safer statement of the English law would therefore be that this right to freedom of contract only extends to contracts which are neither criminal, immoral, nor expressly *made illegal* by existing laws.

In this country, however, our courts have frequently taken a stronger position; and in some cases have seemed to hold that general freedom of contract is an old English constitutional principle. If so, as the American colonists, according to the opinion of both Blackstone and Benjamin Franklin,[3] brought over the principle as part of their common inherited liberties, before the adoption of our written state and federal constitutions, and, unless contradicted by express provisions of these latter, it may stand as a constitutional principle to-day.

No state constitution expressly denies the principle of freedom of contract; therefore, if this be an old constitutional right, it remains to all American citizens to-day, unless we hold that by the adoption of written constitutions they have impliedly abandoned, at least as to the legislature, all constitutional rights not expressed in these. It may still be questioned whether this is generally the case; there is no high authority in favor of it, except in Massachusetts, which has a

[3] 1 Bl. Com., 107; 4 Franklin's Works, Sparks, 271.

peculiar provision in its constitution giving to the legislature of that state unusual scope; and there are many early decisions of leading judges against such a view;[4] just as there are plenty of

[4] That there are fundamental principles of free government underlying the provisions even of our written constitutions, unless expressly denied by them, was the opinion of Marshall, Story, Bushrod Washington, and Daniel Webster. See Fletcher *v.* Peck, 6 Cranch, 87, at pp. 135, 139; Terrett *v.* Taylor, 9 Cranch, 43, at p. 51; Wilkinson *v.* Leland, 2 Peters, 627, at p. 657; 5 Webster's Works, 487; 2 ib., 392; Washington's Opinion, Corfield *v.* Coryell, 4 Wash., 371, at p. 380; see also The Regents *v.* Williams, 9 Gil. & J., 365, at p. 408; Ham *v.* McClaws, 1 Bay, 98; Bowman *v.* Middleton, 1 Bay, 252; Field's dissenting opinion, Slaughter-House cases, 16 Wallace, at p. 106; Bradley's opinion at p. 116; Calder *v.* Bruce, 3 Dallas, 386, by Chase, J., at p. 388; Holden *v.* James, 11 Mass., 396, at p. 404; Austin *v.* Murray, 16 Pick., 121, at p. 124; Hoke *v.* Henderson, 4 Dev. (N. C.), 15; Atchison & N. Ry. *v.* Baty, 6 Neb., 37; Sweet *v.* Hulbert, 51 Barb., 318, 319; People *v.* Lawrence, 54 Barb., at p. 616; Doe's dissenting opinion, Orr *v.* Quimby, 54 N. H., 606; C. R. R. *v.* Greely, 17 N. H., 47, at p. 56; E. Kingston *v.* Towle, 48 N. H., 57, at pp. 60, 61; Maine *v.* Doherty, 60 Me., 504, at pp. 509, 510; Wheeling Bridge *v.* Gilmore (1894), 8 O. C. C., 658, at p. 664; Com. *v.* Perry, 155 Mass., at p. 121.

Cooley takes the contrary view (Const. Limitations, pp. *165-171), but his subsequent statements, though based on the threefold division of power, appear substantially inconsistent. (See *pp. 174–177.) And see, to the contrary, People *v.* Gallagher, 4 Mich., 244; Iredell's opinion, Calder *v.* Bruce, 3 Dallas, 386; Orr *v.* Quimby, 54 N. H., 590; Cochran *v.* Van Surley, 20 Wend., 365, at p. 382; Braddee *v.* Brownfield, 2 Watts & Serg., 271 at p. 277; Bank of

recent decisions on the bare point that state legislatures are only limited by the state and federal constitution.

Chenango *v.* Brown, 26 N. Y., 467, at p. 469; People *v.* Flagg, 46 N. Y., 404; Moor *v.* Veazie, 32 Me., 344.

That there are unwritten constitutional rights in this country would seem to be the theoretical principle; but there are not many actual cases directly nullifying a statute on this ground since the Revolution. As Iredell said, in Calder *v.* Bruce, above cited, "it is true that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I cannot think that under a government composed of legislative, executive, and judicial departments, any court of justice would possess a power to declare it so." (See, however, Maine *v.* Doherty, and Sweet *v.* Hulbert, above; Taylor *v.* Porter, 4 Hill (N. Y.), 144; Bradley *v.* Falbrook Irrigation Co., Pac. R., and Wheeling Bridge *v.* Gilmore, above.) On the other hand, the better opinion would seem to be that if there be any such, the people have not waived them by adopting written constitutions, except in so far as these expressly control them. The courts, moreover, have been very broad in interpreting the provisions of the written constitutions to include such fundamental principles. In East Kingston *v.* Towle, 48 N. H., 57, 61, and other similar cases, the provision in the bill of rights that "no subject shall be arrested, imprisoned, despoiled, or deprived of his life, liberty, or estate but by . . . the law of the land," has been interpreted to mean, not any law or statute which the legislature might pass, but only a law not in violation of the fundamental maxims of justice and equity, not arbitrarily benefiting one person, or the state at the expense of another, nor arbitrarily making class distinctions. The phrases "law of the land," "due process of law," are thus made practically synonymous with what we have termed the "unwritten constitution."

The Massachusetts constitutional provision (Part II., Chap. i., Sect. 1, Art. 4) expressly empowers the legislature "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to *this* constitution, as *they* shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." The word *this* might seem to authorize the Massachusetts Legislature to pass any laws which are reasonable [5] and not in conflict with the provisions of the written constitution of that state. And in three instances at least the Massachusetts Supreme Court has held, twice by direct decision and once inferentially, that the legislature has power to limit or forbid the making of certain kinds of contracts concerning labor.[6]

[5] And of this reasonableness the courts, by the usual doctrine, may not be the judge. To leave this determination to them would be subversive of our principle of three departments of government, to determine the reasonableness of a statute being not a judicial but a legislative function. Of its constitutionality alone are the courts the judge. Moor *v.* Veazie, 32 Me., 544; and see next note.

[6] Thus, Com. *v.* Perry, 155 Mass., 121, the majority opinion, while recognizing general freedom of contract, seems to hold that under the above provision the legislature might constitutionally forbid contracts under which the employee

But there is no such broad authority usually given to the legislatures by the constitutions of the other states.[7] It is probable that in most of

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rendered himself liable to a fine by the employer; while in Opinion of Justices, Weekly Payment Law, 163 Mass., 589, and Com. *v.* Hamilton Mfg. Co., 120 Mass., 383, a definite prohibition by law of certain contracts was sustained.

[7] Nevertheless there are similar provisions in the neighboring states of New Hampshire, Maine, Vermont, and in Georgia and Alabama; N. H. C., 1, 31; 2, 5; Mass. C., 2, 1, 1, 4; Me. C., 4, 3, 1; Vt. C., 2, 9; Ga. C., 3, 7, par. 22; Ala. C., 4, 25. But it does not appear that they have ever been construed, except in Massachusetts and Maine, to extend the power of the legislature to all things not expressly forbidden in the state constitution; and the Maine constitution expressly so requires. On the contrary, by an early opinion of the Supreme Court of New Hampshire, given in 1827 (4 N. H., 566), this constitutional limitation of the legislative authority is stated and explained as follows: "The power granted is a power to make all manner of laws and statutes which are wholesome and reasonable, and not repugnant to the constitution. It is in its nature a limited, restricted power. It is an old maxim of the common law, that when an act of parliament is against common right and reason, the common law will control it and adjudge it void; and one object of this provision in our constitution was to adopt and confirm that maxim of the common law. An act of the legislature, in order to have the force of a statute, must, therefore, be neither repugnant to reason nor to the constitution."

And in a later case, East Kingston *v.* Towle, 48 N. H., at p. 59, by Judge Perley, "The general court is the legislative department of the state government, and has under the constitution an ample grant of legislative power; the extent of the power is, however, limited, not only by the express prohibitions of the constitution, but by the nature itself of the

the states such power is expressly denied the legislature under their constitutional provision (inserted usually at the end of the first, or Bill of Rights section) that "this enumeration of rights shall not be construed to impair or deny others, retained by the people;"[8] or that "all

power granted; and to be valid and binding the act of legislature must be within the general scope of legislative authority. The power delegated by the constitution "to make and ordain all manner of reasonable and wholesome orders, laws," etc., confers no authority to make an order or law in plain violation of the fundamental principles of natural justice, though the act may not be prohibited by any express limitation in the constitution."

And in a Rhode Island case (Wilkinson *v.* Leland, 2 Peters, 627), occurring before the adoption of the state constitution, but under the old charter of Charles II., which gave the legislature power to make laws in the most ample manner, the United States Supreme Court, by Judge Story, held in effect that such power did not allow the legislature to interfere with general rights of personal liberty and property based on unwritten constitutional principles, and said (p. 657), "No court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention."

[8] Me. C., 1, 24; R. I. C., 1, 23; N. J. C., 1, 21; O. C., 1, 20; Io. C., 1, 25; Minn. C., 1, 16; Kan. C., B. Rts., 20; Neb. C., 1, 26; Md. Decln. Rts., 45; Va. C., 1, 21; N. C. C., 1, 37; Mo. C., 2, 32; Ark. C., 2, 29; Cal. C., 1, 23; Ore.

powers not herein delegated remain with the people."[9] So in some other states the constitutions declare that "a frequent recurrence to fundamental principles is necessary to preserve the blessings of liberty."[10] Do these fundamental principles include property or freedom of contract? If so, it will in these states be expressly withheld from legislative action, or even from the constitution itself. Thus, the constitutions of three states declare that some rights cannot be surrendered by men when they enter into a state of society; as the New Hampshire phrase puts it, they are inalienable, because no equivalent can be given for them; as, in New Hampshire rights of conscience; in the Virginias the enjoyment of life and liberty, with the means of acquiring and possessing property;[11] while in Massachusetts and most of the other states the phrase is "certain, natural, essential, and *unalienable* rights; among which may be reckoned

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C., 1, 33; Nev. C., 1, 20; Col. C., 2, 28; Wash. C., 1, 30; Mon. C., 3, 30; Wy. C., 1, 36; Ida. C., 1, 21; S. C. C., 1, 41; Ga. C., 1, 5, 2; Ala. C., 1, 39; Miss. C., 3, 32; Fla. C., Decln. Rts., 24; La. C., 13.

[9] O., Kan., Neb., N. C., S. C.

[10] Vt. C., 1, 18; Ill. C., 2, 20; Wis. C., 1, 22; Va. C., 1, 17; W. Va. C., 3, 20; N. C. C., 1, 29; Wash. C., 1, 32; S. D. C., 6, 27. In New Hampshire and Massachusetts alone such "fundamental principles" are limited to those set forth in the constitution itself: N. H. C., 1, 38; Mass. C., 1, 18.

[11] N. H. C., 1, 4; Va. C., 1, 1; W. Va. C., 3, 1.

. . . that of acquiring, possessing, and protecting property";[12] and of this the right to contract has been generally held to be a necessary result.[13] So in Arkansas, the bill of rights declares that "the right of property is before and higher than any constitutional sanction."[14]

§ 2. **Right to Freedom of Contract by Written Constitutions.**—But however we decide as to the unwritten constitutional right the courts have held universally that freedom of contract is part of the written constitution of every state where it has come in question, even in Massachusetts, despite the peculiar provision of its constitution discussed in § 1. Such right is based usually on the expressed constitutional "essential" or "unalienable" right to acquire, possess, and protect property;[1] which necessa-

[12] For these states see § 2, note 1.

[13] Low *v.* Rees Printing Co., 59 N. W., 362; Braceville Coal Co. *v.* People, 35 N. E., 62; Leep *v.* Ry. Co., 25 S. W., 75; People *v.* Gilson, 109 N. Y., 399; Com. *v.* Perry, 155 Mass., 121; Wheeling Bridge Co. *v.* Gilmore, 8 O. C. C., at p. 665.

[14] Ark. C., 2, 22.

[1] This is substantially the phrase in twenty states, substituting in some the words "inherent" and "indefeasible" for "essential" and "unalienable": N. H. C., 1, 2; Mass. C., 1, 1; Me. C., 1, 1; Vt. C., 1, 1; N. J. C., 1, 1; Pa. C., 1, 1; O. C., 1, 1; Io. C., 1, 1; Del. C., Preamble; Va. C., 1, 1; W. Va. C., 3, 1; Ky. C., 1; Ark. C., 2, 2; Cal. C., 1, 1; Nev. C., 1, 1; Col. C., 2, 3; Mon. C., 3, 3; Ida. C., 1, 1;

rily "includes the right to make reasonable contracts which shall be under the protection of the law;" [2] for the express phrase "freedom of contract" is not found in any constitution, probably because the makers thought it unnecessary. But it is also a provision of the federal constitution (Art. IV., § 2), that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and

S. C. C., 1, 1; Fla. Decln. of Rts., 1. But in other states it is only declared to be the object, or the sole object, of government to protect the citizen in the enjoyment of life, liberty, and property: Ill. C., 2, 1; Neb. C., 1, 1; Wy.; Ark. C., 2, 2; Ga. C., 1, 1, 2; Ala. C., 1, 37; La. C., 1; so in Missouri C., 2, 4, and South Dakota C., 6, 1, the test word "unalienable" is not used.

As the states have commonly a provision that the people have at all times the right to alter the government if it fail of its purposes, or that "when the government assumes other functions it is usurpation and oppression," it would follow that if the legislature passed laws interfering with these natural rights, and the courts maintained such laws, the people would have as it were a constitutional right to revolution. (See Stimson's American Statute Law, §§ 15, 182, 183, and 184.)

The constitutions of Kentucky and Wyoming, moreover, provide that "absolute arbitrary power over the lives, liberty, or property of freemen exists nowhere in a republic, not even in the largest majority": Ky. C., 2; Wy. C., 1, 7.

And that of Washington, "that no person shall be disturbed in his private affairs or his home invaded without authority of law": Wash. C., 1, 7.

[2] Com. *v.* Perry, 155 Mass., 127; State *v.* Goodwill, 13 W. Va., 179, and State *v.* Fire Creek Coal Co., ib., 188; State *v.* Stewart, 59 Vt., 273.

these were held by Judge Washington [3] to include all fundamental rights belonging to the citizens of all free governments, such as the right to life and liberty, and to acquire and possess property *of every kind*, and the right to engage in trade, etc.; and (Fourteenth Amendment) that "no state shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." And the Ninth Amendment provides, "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." There is also the provision common to the federal and all state constitutions, except that of New Jersey, Ohio, and Indiana, that no person can be deprived of his life, liberty, and property except "by due process of law," or by "the law of the land;" [4] but this applies rather to criminal or penal process. See, however, § 1, note 4, above.

For this reason (that right to contract is expressly guaranteed by the constitution) the following kinds of law have been declared unconstitutional: statutes limiting the hours of labor

[3] Corfield *v.* Coryell, 4 Wash. C. C., 380.

[4] See Stimson's Am. Stat. Law, § 130; U. S. C. Amt. 5.

for adults, such as eight-hour laws, etc.;[5] *truck-acts*, or laws providing that employees shall be paid in money only, not in goods or orders;[6] laws forbidding dealers to give or offer prizes with goods sold;[7] laws forbidding employers to measure wages by screened coal;[8] or to withhold wages for imperfect work,[9] or damage to material; laws providing that employees must be paid at stated intervals and forbidding contracts for a longer time;[10] laws limiting the right of a person to contract with whom he will, as for instance, with non-union employees;[11] laws forbidding the citizens of a state to engage in any specified business.[12]

And the right to contract is further protected by the fact that laws specially regulating or prohibiting certain kinds of contracts are very apt to fall under the constitutional prohibition of "class legislation." (See § 11, below.) Thus, weekly payment laws, etc., have been held unconstitutional because they applied solely to miners or railway employees;[13] laws restricting remedies for libel because they applied solely to

[5] See, hereinafter, §§ 11, 13.

[6] See §§ 23, 24.

[7] People *v.* Gillson, 109 N. Y., 389.

[8] See § 25.

[9] This was the point in Com. *v.* Perry, above; and see § 20.

[10] See § 21.

[11] See § 52.

[12] McCullough *v.* Brown, 19 S. E., 458.

[13] San Antonio & A. P. Ry. Co. *v.* Wilson, 19 S. W., 910; State *v.* Loomis, 22 S. W., 350.

newspapers;[14] laws relating to actions for cattle killed, because they applied solely to railroads;[15] and the Supreme Court of Pennsylvania has expressed a doubt whether a statute legalizing trade combinations is not unconstitutional, because it does not in terms apply to employers as well as employees;[16] and the leading decisions against eight-hour laws went partly on the ground that the laws applied to factories and workshops, but not to other classes of laborers, or not to farm and domestic labor.[17] On the other hand, a statute forbidding attorneys-at-law from buying promisory notes has been sustained.[18]

Our conclusion must be that laws limiting the natural or constitutional rights of any persons or class of persons are generally invalid, unless they can be sustained under the police power of the legislature, as defined in the next section; and that laws which apply only to a class or to certain persons of a class, may be invalid also because class legislation.[19] This matter is more fully discussed in § 11, below.

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[14] Park *v.* Detroit Free Press Co., 72 Mich., 560.

[15] Atchison & N. Ry. *v.* Baty, 6 Neb., 39.

[16] Cote *v.* Murphy, 159 Pa. St., 420. See *post*, § 58.

[17] Ritchie *v.* Illinois, 155 Ill., 98; Low *v.* Rees Printing Co., 59 N. W., 366. See *post*, § 11.

[18] People *v.* Walbridge, 3 Wend., 120.

[19] New York Elevated RR. Cases, 70 N. Y., at p. 350.

Finally, it should be noted that the phrase "obligation of contracts" has in the state and federal constitutions nothing to do with the freedom of contract we have been discussing. Nearly all our state and the national constitutions expressly forbid the passing any statute which shall have effect to impair the obligation of contracts; but this only applies to contracts actually existing at the time any such law is passed.

§ 3. **The Employment Contract.**—Freedom of contract, as above defined, being a constitutional right, it follows also as to contracts for labor or employment. Furthermore, this has been frequently held to be a property right also,[1] and as such would be further protected by the constitutions of the states which expressly recognize the right to property,[2] without the necessity of recurring to the unwritten constitution, which, however, is universally recognized, according to Blackstone's definition, to cover at least the three primary individual rights of personal security, personal liberty, and private property.[3] Therefore, in a double way the freedom of the labor contract is a constitutional right, both as part of

[1] State *v.* Goodwill, 33 W. Va., 179; Low *v.* Rees Printing Co., 59 N. W., 362; Ritchie *v.* Illinois, 155 Ill., 98.

[2] See § 2, above.

[3] Blackstone's Commentaries, Book I., Chap. I., *129.

man's personal liberty and as necessarily resulting from the view that labor is property. Other contracts, perhaps, rest on the second principle alone, but the labor contract involves also the principle of personal liberty, and might remain though private property were abolished.

In England the freedom of the labor contract was not, during some centuries, recognized. In 1349 (22d Edward III.) and 1350 the famous statutes of laborers were passed, owing to a scarcity of laborers caused by the great plague, which provided, substantially, both that laborers might be compelled to work, and that the rate of wages should be legally limited. The statute of laborers, after the insurrection of Wat Tyler, whereby all laborers were declared free by the sovereign of England, became inoperative; but later, by a statute of Queen Elizabeth[4] all persons able to work as laborers or artisans, and not having independent means, might be compelled to agricultural labor, and the hours of work were fixed, and the justices given power to fix the rate of wages, and in industrial labor all persons were prohibited from exercising any trade without first serving an apprenticeship of seven years. This law, providing for a legal rate of wages, made it illegal to pay higher rates, and still more illegal to combine[5] for the purpose of exacting higher

[4] 5 Eliz., Chap. 4. [5] 2 and 3 Edward VI., Chap. 15.

rates; as did a still earlier statute of 1549, and this English law lies at the root of the English doctrine as to strikes and boycotts, which prevailed until recent statutes, as the statute of Elizabeth was not formally repealed until 1875.[6] But in the United States this statute was never in force, and although some of the colonies—notably Massachusetts and Virginia—attempted in early times to regulate wages and the hours of labor, such ordinances, passed in colonies which were practically religious or feudal oligarchies, and in sympathy with the English practice, have no weight as precedent since the Revolution and the adoption of the state constitutions. In the United States, therefore, the labor contract has been always constitutionally free in the same manner that all other contracts under the general growth of English liberty became free by the common law. And by the time Blackstone wrote, the freedom in England also of the labor contract, except in the special matter of apprenticeships, was practically admitted in general cases.

In this country the freedom of the labor contract has been certainly always recognized since the revolution. "Personal liberty, that is, the right to make contracts for labor for others, and to employ others to labor, is secured by consti-

[6] 38 and 39 Vict., Chap. 86.

tutional law to all members of this state, and the right is inalienable." [7] Laws which limited it, or even regulated it, in the case of adult citizens, have been commonly annulled by the courts as unconstitutional (see § 2). As in the case of ordinary contracts (see §§ 1, 2), the framers of our constitutions thought it unnecessary even to state it expressly. Only three state constitutions touch expressly upon the subject, and they are of the newest.[8]

We conclude, therefore, that laborers and employees on the one hand, and masters and employers on the other, may freely make with each other any contract they choose, not criminal or immoral, and such contract will be valid; and gen-

[7] People *v.* Warren, 34 N. Y. Supp., p. 944; In re Baker, 29 How. Prac., 485.

[8] "Every citizen of this State shall be free to obtain employment wherever possible." North Dakota Const., Art. 1, § 23.

"No law shall be passed fixing the price of manual labor." La. Const., Art. 49.

"The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the State." Wy. Const., Art. 1, 22.

The Western Code States define (and hence permit) the labor contract by express statute; thus it is "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person." Cal. Civ. C., 1965; Mon. Civ. C., 2650.

This definition is far from exhaustive.

erally speaking, the legislatures have no right to forbid or regulate such contracts by law if the parties are citizens of full age.[9] The exceptions to this latter principle will be considered in the next section and the next chapter.

§ 4. **The Police Power.**—This right to make any contract not immoral nor criminal is only limited in the United States by what is called "the police power of government;" that is, the right of the state and national legislatures to pass any laws, although regulating, or limiting, property, contract, or personal rights, which are clearly necessary to the safety, comfort, or well-being of society. It rests upon the legal maxim that a man must so use his own (property or rights) as not to injure others (in their persons, property, or rights). The power is indefinite in extent and incapable of definition; though a definition has often been attempted. Text-books frequently adopt Judge Shaw's definition,[1] that it is "the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the

[9] Low *v.* Rees Printing Co, 59 N. W., 362.

[1] Commonwealth *v.* Alger, 7 Cushing, 53, at pp. 84, 85.

subjects of the same"—not observing that this broad statement of the power may have been based upon the peculiar provision of the Massachusetts constitution (discussed *ante*, § 1) and therefore be no authority for other states. However, as Judge Shaw adds, "It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise."

This much is clear, that the power "is not above the constitution, but is bounded by its provisions; and if any liberty, or franchise, is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise by the legislature, or by the executive, of the police power;" and "if the legislature shall determine what is a proper exercise of its police power, the decision is subject to the scrutiny of the courts."[2] And the object of the law must really be such health and safety of society, and its measures must have a visible relation to that end; the law will not allow property or personal rights to be invaded under the guise of a police regulation for the protection of health, or safety, when it is manifest the real object is something different.[3]

[2] People *v.* Gillson, 109 N. Y., at p. 400 (differing here from the questions of the "reasonableness" of a law, discussed in § 1, note 5, above).

[3] Low *v.* Rees Printing Co., 59 N. W., 368; Re Jacobs,

The various instances in which laws regulating the employment contract have been held unconstitutional, or constitutional, under the police power, form the special subject of the next chapter. The best way to define the police power generally is to mention a few of the principal subjects in which it has been maintained. These are health regulations; laws defining public nuisances and regulating noxious trades; building laws; liquor laws;[4] Sunday laws; road, highway, and street regulations; wharf, levee, and drainage laws; and laws regulating charges of persons, or corporations in employments "affected with a public interest,"[5] or which enjoy from the public special rights, privileges, grants, or monopolies; and in the domain of labor, general factory regulation. More questionable, in America at least, are laws imposing restrictions upon dealings with classes of persons, not minors, or women, supposedly unable to protect themselves, such as regulations governing minors, intelligence-offices, etc. The exception of laws protecting sailors comes hardly under the police-power doctrine, but rather from ancient custom coeval with the unwritten constitution itself; and the same may be said of the laws against usury.

98 N. Y., 98; Austin *v.* Murray, 16 Pick., 121, at p. 126; Watertown *v.* Mayo, 109 Mass., 315.

[4] Mugler *v.* Kansas, 123 U. S., 624.

[5] People *v.* Budd, 117 N. Y., 1.

But the branch of the police-power doctrine under which the greatest modern extension has happened, and the greatest future growth may be expected, peculiarly in laws affecting labor, or the employment relation, is that of *fraud*: the doctrine by which laws are justified which interfere with private rights in order to prevent a prevailing fraudulent imposition on the public generally, or upon any definite class of persons. Such are laws which require the employer to give the same notice of discharge to his employees that he requires of them;[6] laws forbidding the screening of coal before weighing, to determine the miners' wages;[7] the laws against adulterations of food, or imitations, like oleomargarine;[8] and laws giving a special protection to claims for wages, or priority to labor liens.[9]

§ 5. **Intimidation and Interference with the Employment Contract, Trades, and Lawful Occupations.**—It results directly from the general

[6] See § 22.

[7] See § 25.

[8] Palmer *v.* State, 39 O. St., 236; Commonwealth *v.* Waite, 11 Allen, 264; Shivers *v.* Newton, 16 Vroom, 469; State *v.* Campbell, 64 N. H., 402; State *v.* Marshall, 64 N. H., 549; Weideman *v.* State, 56 N. W., 688. It must be noted that such laws, if the commodity be harmless, may, however, be unconstitutional as an interference with the interstate commerce. Re Worthen, 58 F. R., 467.

[9] §§ 34–37.

freedom of the labor contract (§ 3) that any attempt, even of a single individual, by violence, intimidation, or threats of injury to person or property, to control such employment contract, to prevent a man from working, or an employer from employing, or to obstruct or molest either party to a contract of employment in making it or carrying it out when made, is a civil wrong for which either party, if injured, may recover damages. Such is the law in the absence of any statute, both in England and this country.[1] But it is not, in the absence of statute, a criminal offence, unless it be more than a threat or mere civil trespass, and amounts to an assault or criminal destruction of property. In many states, however, as in England, it is made a criminal offence by statute. If the acts or threats are committed as part of a combination of two or three or more persons for the purpose of so interfering with the employment contract or its carrying out, the law is much stricter; in such cases even moral intimidation, such as ridicule, or persuasion to break or not to make the employment contract, may suffice to make the parties thereto guilty of conspiracy (see Chapter VIII., on Trade Conspiracies and Boycotts, and § 59).

[1] Carew *v.* Rutherford, 106 Mass., 1. This law seems to apply even to intimidation of persons trading with the plaintiff. Tarleton *v.* McGawley, Peak N. P. C., 270.

Thus, in New England, Indiana, Illinois, Wisconsin, Missouri, Oregon, the Dakotas, Montana, South Carolina, Georgia, Alabama, and Texas it is made by statute a crime or misdemeanor to prevent or seek to prevent by force, threats, or intimidation any person from entering into or continuing in the employment of any other person or corporation, or (in Maine, Vermont, Illinois, Oregon, the Dakotas, Montana, Oklahoma, and Georgia) the employer from employing, or any person (in New Hampshire, Illinois, Montana, Georgia, Wisconsin, Oklahoma, and Alabama) from carrying on any lawful trade or calling, as by interfering (in Illinois, New York, Minnesota, Montana, Georgia) with a person's tools or other property and the use thereof. Or, in Oregon, Dakota, and Oklahoma, to compel another to employ any person, or to force or induce another to alter his mode of carrying on business, or to limit or increase the number of persons employed by him, or their rate of wages or term of service. While in the New York law, followed also in Connecticut and Minnesota, it is made a misdemeanor to use or attempt the intimidation by threats or force of any person from doing or abstaining from *any* act which such person has a legal right to do or abstain from doing, as by depriving him of his tools, clothing, or implements. And finally, in North Dakota, there is a constitutional provision that

"any person, corporation or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor." [2]

There are, further, in several states important statutes specially forbidding intimidation or interference with the employment contract, in certain occupations where it would be dangerous to the public, such as railways, etc., or even in gen-

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[2] N. H., 266, 12; Mass., 1894, 508, 2; Me., 1889, 303; 1891, 127; Vt., 5041, 5042; R. I., 241, 8; Ct., 1518; N. Y. P. C., 653; Ind. R. S., 2126 (this does not appear in the new revision, and is perhaps repealed); Ill., R. S., Chap. 38, 207; Wis., 1887, 427, 1; Minn. P. C., 490; Mo., 3783; Ore., Hill, 1893; N. D. and S. D. P. C., 733, 734; Mon. Crim. L., 252 (does not appear in new revision); Ga., 1887, p. 107; Ala., 3763; Tex., 1887, 18; Okla., 1893, 2544, 2545.

In Michigan the statute appears to be limited to mechanics or laborers; it reads: "If any person or persons shall, by threats, intimidations, or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer, in the quiet and peaceable pursuit of his lawful avocation, such person or persons shall be deemed guilty of a misdemeanor, punishable by fine of one hundred dollars, or imprisonment for one year, or both." Mich., Howell, 9273.

For interpretation of such statutes, see the English cases generally (§§ 55, 57), and Commonwealth *v.* Dyer, 128 Mass., 170. N. D. Const., Art. 1, 23.

eral occupations (see § 62), and in Illinois the statute takes special notice of coal mines.[3]

Enticing Labor.—At the common law a person enticing away another's servant into his own service might be liable for an action for damages; and there are in a few southern states statutes upon the subject making it, in some cases, a misdemeanor, and imposing single or double damages upon the guilty party;[4] and

[3] "Whoever enters a coal bank, mine, shaft, manufactory, building, or premises of another, with intent to commit any injury thereto or by means of threats, intimidation, or riotous or other unlawful doings, to cause any person employed therein to leave his employment, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding six months, or both." Ill., 38, 208.

"Whoever, without authority of law and not being the owner or agent of adjoining lands, enters the coal bank, mine, shaft, manufactory, or place where workmen are employed, of another, without the expressed or implied consent of the owner or manager thereof, after notice that such entry is forbidden, shall be fined not exceeding two hundred dollars, or confined in the county jail not exceeding six months, in the discretion of the court." Ill., 38, 324.

[4] Thus, in Mississippi, and Florida, Kentucky, Arkansas, and Louisiana, "If any one shall wilfully interfere with, entice away, knowingly employ, or induce a laborer, "cropper," or renter who has contracted with another for a specified time, to leave his employer or the leased premises, before the expiration of his or her contract, without the consent of the employer, he shall be guilty of a misdemeanor." (Ky., 1349; Ark., 4792; Miss., 1068; Fla., 2405; La., 1892, 50.) And in Mississippi and Arkansas, "upon conviction he shall

the provisions of the law would seem to extend to any person so persuading a laborer

be fined in any sum not less than twenty-five dollars nor more than one hundred dollars; in addition to such fine he shall be liable to the employer or landlord in double the amount of damages which he or she may sustain by reason of such breach of contract;" but in Kentucky he is liable only in actual damages.

In South Carolina, "Any person who shall entice or persuade, by any means whatsoever, any tenant, servant, laborer under contract with another, duly entered into between the parties in the presence of one or more witnesses, whether such contract be verbal or in writing, to violate such contract, or shall employ any laborer, knowing such laborer to be under contract with another, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five nor more than one hundred dollars, or be imprisoned in the county jail not less than ten nor more than thirty days." S. C., 2479.

In Georgia, "If any person, by himself or agent, shall be guilty of employing the servant, cropper, or farm laborer of another, under a written contract, which shall be attested by one or more witnesses, during the term for which he, she or they may be employed, knowing that such servant, cropper, or farm laborer was so employed, and that his term of service was not expired; or if any person or persons shall entice, persuade or decoy, or attempt to entice, persuade or decoy any servant, cropper, or farm laborer, whether under a written or parol contract, after he, she or they shall have actually entered the service of his or her employer, to leave his employer, either by offering higher wages, or any way whatever, during the term of service, knowing that said servant, cropper, or farm laborer was so employed, shall be deemed guilty of a misdemeanor." Ga., 4500, am'd.

In Alabama, "Any person who knowingly interferes with,

or servant to break his contract, whether he employ the laborer in his own service or

hires, employs, entices away, or induces to leave the service of another, or attempts to hire, employ, entice away, or induce to leave the service of another, any laborer or servant who has contracted in writing to serve such other person for any given time, not to exceed one year, before the expiration of the time so contracted for, or who knowingly interferes with, hires, employs, entices away, or induces any minor to leave the service of any person to whom such service is lawfully due, without the consent of the party employing, or to whom such service is due, given in writing, or in the presence of some creditable person, must, on conviction, be fined not less than fifty nor more than five hundred dollars, at the discretion of the jury, and in no case less than double the damages sustained by the party whom such laborer or servant was induced to leave; . . .

"When any laborer or servant, having contracted as provided in the preceding section, is afterward found in the service or employment of another before the termination of such contract, that fact is prima facie evidence that such person is guilty of a violation of that section, if he fail and refuse to forthwith discharge such laborer or servant, after being notified and informed of such former contract or employment.

"Any person who employs any immigrant, or otherwise entices him from his employer, in violation of the contract of such immigrant, must, on conviction, be fined in a sum not less than the amount of wages for the unexpired term of the contract, and may be imprisoned in the county jail, or sentenced to hard labor for the county, at the discretion of the jury, for not more than three months." Ala., 3757, 3758, 3761.

In Tennessee, "It shall not be lawful for any person in this state knowingly to hire, contract with, decoy or entice

not.[5] Thus, an early North Carolina case[6] decided that a person who so entices one who has contracted to render personal service to the plaintiff, for a consideration however slight, and even though under an unreasonable contract, is liable in damages. But there must, in modern law, be a contract; no action lies against an individual for persuading a servant to leave at the end of his term, or if under no contract.[7]

§ 6. **The Enforcement of the Labor Contract.**— The labor or employment contract is, however, subject to one great exception from the law governing other contracts, and that is that it can never be enforced in courts of equity. The

away, directly or indirectly, any one, male or female, who is at the time under contract or in the employ of another.

"Any person violating the provisions of the above section shall be liable to the party who originally was entitled to the services of said employee, by virtue of a previous contract, for such damages as he may reasonably sustain by the loss of the labor of said employee; and he shall also be liable for such damages, whether he had knowledge of an existing contract or not, if he fails or refuses to discharge the person so hired, or to pay such damages as the original employer may claim, after he has been notified that the person is under contract or has violated the contract with another person." Tenn., 3438, 3439.

[5] Carew *v.* Rutherford, 106 Mass., 1.

[6] Haskins *v.* Royster, 70 N. C., 601.

[7] Boston Glass Co. *v.* Binney, 4 Pick., 425; Bowen *v.* Matheson, 14 Allen, 499.

specific performance of all other contracts will be granted in proper cases; but the English Court of Chancery, followed by all United States Courts, has consistently refused to enforce the contract for labor or personal service. In the absence of express statute, the only remedy of the employer lies in an action for damages against the employee. He may however get an injunction against his servant or employee from working for others, in breach of his contract with him.[1]

The reason of this is obvious. The contract of service is by its nature indefinite in its terms, and deals not with goods or commodities in the ordinary sense, but with a man's self, his abili-

[1] It is unnecessary to cite cases on this point, but the one usually referred to is that of Lumley *v.* Wagner, 1 De G., M. & G., 604. The principle was well discussed and sustained in the case of Mary Clark, 1 Blackford, Ind., 122, where an employer endeavored to enforce a contract for twenty years' service made by a mulatto woman.

But the western codes have this peculiar provision:

"A contract to render personal service, other than a contract of apprenticeship, . . . can not be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation." Cal. Civ. C., 1980; Mon. Civ. C., 2675; it would appear from the above that the contract *may* be enforced specifically during the two years. See also § 9, below.

ties, or his person. To enforce such a contract against a person's will would be too much like enforcing a contract of slavery. The English and American courts, therefore, both wisely and humanely, have always granted this special privilege to laborers and servants, and even to employees: that they would not enforce their contracts against them specifically, but only allow the master or employer a suit for damages, which in most cases is no remedy. The contract may, however, be enforced against the employer, even specifically; that is, the employee doing or offering to do the work may recover his wages. The labor or employment contract, therefore, rests in this peculiar condition, that it is the only contract known to the law which is practically open to one party to break, but not to the other.

Whether the employer has any remedy against a simultaneous breaking of the employment contract by a number of persons upon preconcerted agreement, will be considered later in the chapter upon strikes (§ 55).

There has, however, been a recent tendency in the federal courts of the United States, mainly as a consequence of the Anti-Trust Act of 1890, and the Interstate Commerce Law of 1887, to enforce by equity process the performance of the contract of employment by large bodies of persons, such as railway employees or steve-

dores, who are engaged in transporting or handling articles the subject of interstate commerce. The most notable instance is, perhaps, the case of the Southern California Railway *v.* Rutherford,[2] in which Judge Ross, of the U. S. District Court for California, upon a bill alleging that the employees of a railroad company, not having formally quitted their employment, refused to perform their duties of operating its trains, granted an injunction requiring the defendants to perform all of their regular and accustomed duties "so long as they remain in the employment of the complainant company." This decision, so far as it rests upon the contract of service, seems open to criticism. The ordinary doctrine that courts of equity will not enforce employment contracts does not seem to have been present in the court's mind, and there would appear no tenable distinction between enforcing an employment contract specifically and getting a mandatory injunction upon employees to perform all the duties of such employment until such time as they chose to leave the employment. When a servant refuses to obey the directions of the master, the master's only remedy is to discharge him, and then sue for damages if he thinks it worth while. In so far as Judge Ross's decision rests on the pecul-

[2] 62 F. R., 796.

iar provisions of the Anti-Trust Act, that is, on the ground that the defendant employees were conspiring to hinder interstate commerce, it may be sustained; but this matter will be discussed more fully hereafter.

There are, however, a few state statutes defining the labor contract and prohibiting violations of it. Thus, in Louisiana, "Whoever shall wilfully violate a contract upon the faith of which money or goods have been advanced and without first tendering to the person from whom said money or goods were obtained the amount of money or value of the goods, shall be deemed guilty of a misdemeanor."[3]

In Arkansas, "If any laborer shall, without good cause, abandon his employer before the expiration of his contract, he shall be liable to such employer for the full amount of any account he may owe him, and shall forfeit to his employer all wages or share of crop due him, or which might become due him from his employer.[4]

In Tennessee, "Any persons so under contract or employ of another, leaving their employ without good and sufficient cause, before the expiration of the time for which they were employed, shall forfeit to the employer all sums due for service already rendered, and be liable for such

[3] La., 1890, 138, 1.

[4] Ark., 4790.

other damages the employer may reasonably sustain by such violation of contract."[5]

In England also a recent statute had provided a summary remedy for breach of contract or refusal to work by laborers in certain specified employments, by which servants, apprentices, and factory employees can be brought before a magistrate, who may either abate the wages due, or direct the fulfilment of the contract of service, and require recognizance therefor and commit the employee to jail, for a term not exceeding three months, in case he fail to comply therewith. The effect of this provision is to make such breach of the employment contract a penal offence in England, and for that reason the leading case of Reg. *v.* Bunn[6] was decided. With the exception of the few statutes above cited, there is no such law in this country.

§ 7. **Breach of the Employment Contract not Criminal.**—As the breach of the employment contract only renders the employee liable in damages, and does not subject him to specific performance in a court of equity, so it can never be a criminal offence in the absence of such special statutes as those mentioned in the last section; and not being a criminal offence on the part of an individual, it is not a criminal offence

[5] Tenn., 3438.

[6] 12 Cox C. C., 316.

on the part of any number; that is, the mere leaving employment of a large number of workmen, simultaneously or successively, in itself can never subject them to criminal punishment. When they combine by preconcerted arrangement to leave at the same time, certainly when such combination is for the purpose of injuring the employer or any other person, such combination may become punishable as a conspiracy; but in such case it is not the leaving service that is punished, but the combination or conspiracy to injure the employer by so leaving. This matter will be fully discussed in Chapter VIII., §§ 51, 55. If, however, the employees are all under contract to work for a certain period of time, then the combination merely to break such contract without intent to do any other injury may also become an unlawful conspiracy.[1] In most cases, however, of industrial occupations, the employment of the operative is an indefinite one as to time. He may leave at any time without committing a technical breach of contract; and hence may combine with other workmen to leave work at any time without thereby committing an unlawful conspiracy.

§ 8. **Discharge or Termination of the Labor Contract by the Employer.**—Where there is no

[1] Reg. *v.* Bunn, 12 Cox C. C., 316.

determinate period of service, the employment contract may, of course, be ended by the employer also at any time and without giving any claim to the employee for damages. Whether the mere fact that wages are paid regularly at certain terms, such as weekly or monthly, requires a notice equal to such period of payment, is not so clear. In domestic service, by custom or otherwise, the law has usually so settled it; but in ordinary industrial employment, it would seem that the employer may discharge at any date upon payment of wages due up to that time. As a matter of custom a reasonable notice is usually given.

But there are in some states statutes requiring notice of discharge from the employment in cases where a notice of leaving service is required by special contract from the employee. Such statutes will be fully discussed under § 22.

Where, however, the express contract of employment is for any definite period, or from term to term, the employer may not discharge the employee, except for his misconduct, without becoming liable in damages for the breach of contract, and such damages may either be computed at the full amount of the wages which would accrue if the employees served out the entire contract, or at the difference between such amount and the wages he might actually

earn in other employments. This latter question is for the jury.

The nature and amount of fault on the part of the employee that would justify the employer in putting an end to the contract is somewhat indeterminate. Under some cases it would be a question of fact for the jury. Where, however, there is an express agreement that the work must be done to the employer's satisfaction, the employer is the sole judge of the sufficiency of such work, and may discharge for bad work at his own discretion.[1]

Statutes, however, are beginning to be passed aimed at preventing arbitrary discharge by corporation employers; thus in Massachusetts "railroad, express, and telegraph companies are required to furnish any discharged employee with a written statement of the causes thereof"[2] (see § 61, *Blacklisting*); or at preventing discharge for membership in labor unions (see § 52).

An employee may have an action for damages against a person causing his discharge, though under an indefinite contract, by refusing to furnish his employers with a side track from a railroad of which the defendant was manager.[3] But in these cases the threat or effort to obtain

[1] Koehler *v.* Buhl, 94 Mich., 496. [2] Mass., 1892, 382.
[3] Chipley *v.* Atkinson, 1 So. Rep., 934.

defendant's discharge must be successful. A mere threat is not sufficient.[4]

§ 9. **Of the Duties of the Employee; Terms of the Contract; Slavery.** (Compare § 49.)—As has been said in § 6, while the duties of the employee are to carry out in full the contract of work for which he is employed, the employer has no remedy if he fail in the same other than by discharging the workman and suing him for damages; but this latter remedy is rarely employed.[1] A contract for any definite employment requiring only certain prescribed duties, or a part of the employee's time, may probably be made for any period of years, though this is rarely the case except in case of skilled business men, overseers, or master workmen whose services are paid for by an actual salary, or a percentage of the profits, or by commission on the business they bring. In the case of general service, however, such as domestic or farm labor, which involves the residence of the employee or servant with the master, it is probable that a con-

[4] Payne *v.* R. R. Co., 13 Lea, 507.

[1] An interesting case where it was employed is Bowes *v.* Press (1894), 70 L. T. R., 116, where the contract provided for two weeks' mutual notice of termination. Without such notice a miners' union gave notice they would not descend in cages with non-union men, and twenty days thereafter refused to do so. The employers were held entitled to substantial (5 shillings) damages against all who so refused.

tract for a long period of years or for life would not be sustained by the courts even to the extent of giving the master an action for damages. The only statute on the subject is in California, which limits contracts of personal service to two years (see § 6, note 1).

Contracts of employment or service may, however, provide that until or unless the whole period of service is performed the servant or employee can demand no part of his wages. The legality of such a contract rests on the principle that the performance of the whole work, or of a prescribed term of the work, is a condition precedent to the recovery by the employee of his wages for the whole time or for any special period, as the case may be. Such contracts are perfectly legal, but they must be clear. If it is not clear that the contract means to forfeit all claim for damages in case the employee leave the employment before the prescribed time, such leaving employment will only give the master a right to have the wages to be paid abated by a proportionate amount.[2]

Some states have, however, passed express statutes providing against the workman's leaving without giving a certain notice (see hereafter in § 62) in special occupations.

[2] Stark *v.* Parker, 2 Pick., 267; Olmstead *v.* Beal, 19 Pick., 528; Hunt *v.* The Otis Co., 4 Met., 464; Fuller *v.* Brown, 11 Met., 440.

CHAPTER II

STATUTES REGULATING THE EMPLOYMENT CONTRACTS

§ 10. **Wages.** — No one of the United States has attempted to legislate concerning the rate of private wages; the constitution of Louisiana specially forbids it (see § 3, note), and such a law would be unconstitutional in all the states. As to public work (see § 12), it is possible that a statute requiring municipal corporations to pay not more, nor less, than a certain sum, or to pay a certain sum, would also be held unconstitutional in favor of any city or town resisting it; but no case of this sort has yet arisen. A municipal corporation may, however (in the absence of any prohibition in its charter or the general law governing it, such as "that all public contracts shall be let to the lowest bidder"), fix the payment for wages by resolution or vote at what price it choose; and towns and cities in the New England states often do fix the price they shall pay unskilled labor in that way, usually at $2 a day. Such resolutions have not commonly been questioned, though it may be doubted whether town officers are bound by them. But

municipal ordinances or by-laws must generally be reasonable and subject to review by the courts; and it is probable they would set aside an ordinance prescribing a grossly unreasonable rate. And Cooley[1] says: "The power of municipal corporations to make by-laws is limited in various ways.

"It is controlled by the constitution of the United States and of the state. The restrictions imposed by those instruments, and which directly limit the legislative power of the state, rest equally upon all the instruments of government created by the state. If a state cannot pass an *ex post facto* law, or law impairing the obligation of contracts, neither can any agency do so which acts under the state with delegated authority. By-laws, therefore, which in their operation would be *ex post facto*, or violate contracts, are not within the power of municipal corporations; and whatever the people, by the state constitution, have prohibited the state government from doing, it cannot do indirectly through the local governments.

"Municipal by-laws must also be in harmony with the general laws of the state, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way."

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[1] Cooley: Const. Lim., * p. 198.

It is possible, however, that even an ordinance fixing the rate of wages to be paid by the town, for a brief period, or from year to year, might be regarded rather as a contract, or as a vote instructing the town officers as to the terms of a contract which they had the legal power to make, than as a by-law; and hence would not be subject to any constitutional objections. The question whether any town had power so to limit and control its officers, would turn upon the statutes of the state and its general system of municipal government. Where, as in most western states, the powers of city or town governments are expressly delimitated, it would seem that they have no power to fix wages by order or by-law, but the rate must be left in each case to the parties or officers to whom the law has delegated authority to make the contract for the labor in question. In California there is a statute requiring all municipalities to hire labor by the day only (see § 12).

There is one constitutional provision[2] seeking to provide reasonable pay for labor in general cases. From the nature of the thing such provisions can hardly be more than glittering generalities. And there is a new law in Michigan requiring all highway labor and taxes to be expended "within the limits of the township;"

[2] Wyoming. See § 3, note.

which may mean that laborers without the town cannot be employed, and hence might have some effect in locally advancing the rate of wages.[3] In Kansas, municipal corporations, the state, or contractors for public work shall pay "not less than the current rate of *per diem* wages in the locality where the work is performed."[4]

§ 11. **Hours of Labor, Generally.**—No states have passed laws limiting, in all occupations, the hours of daily labor of adult men, or forbidding contracts to labor for any length of time the parties may voluntarily agree upon. (See, however, §§ 13, 14, Georgia and South Carolina laws.) Such a law would probably be held unconstitutional in every state (see §§ 1–3). The nearest attempt to pass such a law was the Nebraska statute of 1891, ch. 54; this provided that eight hours should "constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state of Nebraska, excepting those engaged in farm and domestic labor. . . . Any employer or corporation working their employees over the time specified in this act shall pay as extra compensation double the amount per hour as paid for previous hour." The statute also imposed a fine as for misdemeanor upon any corporation or private

[3] Mich., 1895, 231.

[4] Kan., 1891, 114.

employer who should fail to comply with, or evade, these provisions.

It will be noted that this statute did not in terms forbid contracts for a longer day than eight hours, but only required double compensation for the overtime. Nevertheless, the statute was declared unconstitutional and annulled by the Supreme Court of Nebraska in 1894,[1] both on the ground that it denied freedom of contract, and that it made a class distinction against farm and domestic labor. The case will be more fully discussed hereafter in § 13.

So, in Colorado, in 1895, the opinion of the Supreme Court was asked by the legislature on a bill, § 1 of which read "eight hours shall constitute a legal day's work for all classes of mechanics, workingmen, and laborers employed in any occupation in the State of Colorado." It does not appear whether extra work for extra pay was to be allowed, but inferentially not. It appeared that an amendment was proposed limiting the act to laborers employed in mines, factories, and smelters; and the court expressly decided both questions in the following words:

"It is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state, and impose upon them restrictions, with reference to the hours of their

[1] Low *v.* Rees Printing Co , 59 N. W., 762; 41 Neb., 127.

employees, from which other employers of labor are exempt. An act such as proposed would be manifestly in violation of the constitutional inhibition against class legislation. The bill submitted also violates the right of parties to make their own contracts—a right guaranteed by our bill of rights, and protected by the fourteenth amendment to the constitution of the United States." [2]

Several states, however, have provided what shall be regarded as a legal day's labor in the absence of any express agreement (or to be implied from well-known conditions of the trade [3]) to the contrary. This is eight hours in six states,[4] and ten hours in five states;[5] while in Florida the agreement for more or less than ten hours must be in writing. In New Hampshire, Connecticut, Pennsylvania, California, and Florida this law applies to *all* classes of labor;[6] in

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[2] Re Eight-hour Law, 39 Pac., 328.

[3] See below in this section.

[4] Ct. G. S., 1746; Pa. Dig., p. 1158; Ind., 1889, p. 143; R. S., 7052; Mo. R. S., 6353; Cal. Pol. C., 3244; 1887, 85; Ill., 1867, p. 101, 1.

[5] N. H., 180, 20; Me., 82, 43; Mich., 1885, 137, § 2; Fla., 2117; Neb., 5329.

[6] The phrase is "All classes of mechanics, workingmen, and laborers," Ind. "All mechanical trades and employments, and other cases of labor and service by the day except farm employment," Ill. "All cases of labor and service by the day . . . between the rising and setting of the sun,"

Maine, Pennsylvania, Missouri, Indiana, Illinois, to all except those engaged in farm or agricultural or domestic service ;[7] and in Maine, Pennsylvania, Missouri, and in general cases in Illinois, it only applies to persons engaged by the day, not by the week or month, and so by court decision in Indiana.[8] (For still narrower statutes applying only to special occupations, see § 14.)

Evasion of the law (by exacting overtime without compensation, etc.) is made a misdemeanor in Indiana.[9]

Such laws provide expressly[10] or impliedly that voluntary contracts for a longer time may be made ; hence they are probably constitutional as not interfering with the right to labor a longer day if a person will. Nevertheless the Supreme Court of Nebraska has lately held,[11]

Pa., Ill. In Michigan (see § 13 also), "In any mechanical, manufacturing or other labor calling." In Missouri an exception is made of labor "employed by the month," and agricultural labor.

[7] The specification of domestic labor is omitted from the exception in Maine, Illinois, and Missouri, but comes in inferentially under the exception of "monthly labor."

[8] Helphenstine *v.* Hartig, 5 Ind. App., 172.

[9] R. S., 7055.

[10] The law so expressly provides in all these states except Nebraska; and in that state the case of Low *v.* Rees Printing Co., while not declaring this statute unconstitutional, clearly renders such an interpretation necessary. See below.

[11] Low *v.* Rees Printing Co., 59 N. W., at p. 366.

not only that an eight-hour law was unconstitutional which required double rates for overtime, on the ground that this was an interference with freedom of contract, but also unconstitutional as class legislation, in that the statute specially excepted farm and domestic labor from its operation; and the Illinois and Ohio laws (though the Illinois statute applied only to women and minors) rested partly on the same ground; the one covering the case of factory labor, the other that of railway employees.[12]

Now this principle forbidding class legislation rests on two express constitutional provisions: that the legislature may not make any grant of special privileges or immunities to any citizen or class of citizens,[13] or that no man or set of men is entitled to exclusive public emoluments or privileges from the community except in consideration of public services;[14] and upon the other frequent provision, that there shall be no special local or private law in any case where provision may be made by general law.

It has, however, been declared by the Su-

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[12] Ritchie *v.* Illinois, 155 Ill., 98. See § 13. Wheeling Bridge Co. *v.* Gillmore, 8 O. C. C., 664. See § 14.

[13] Mass. C., 1, 6; Ind. C., 1, 23; Io. C., 1, 6; Ky. C., 3; Tenn. C., 11, 8; Ark. C., 2, 18; Cal. C., 1, 21; Ore. C., 1, 20; Wash. C., 1, 12; N. D. C., 1, 20; S. D. C., 6, 18.

[14] Vt. C., 1, 7; Ct. C., 1, 1; Va. C., 1, 6; N. C. C., 1, 7; Tex. C., 1, 3; N. M., 1851, July 12, § 2.

preme Court of Ohio that "the equal protection of the law," the principle forbidding class legislation, does not require any express constitutional prohibition to render such laws invalid. And this is doubtless true of all states, and would be so held even in the other states than those mentioned in notes 13, 14, below, states which have not the constitutional provision, certainly where the reason and policy of the distinction do not appear upon the face of the law creating it.[15]

Local or special laws are expressly forbidden by the constitutions of many states. Thus, in several states, "there shall be no special, local, or private law in any case for which provision has been or (except in Georgia and Pennsylvania) can be made by general law."[16] And whether a general law can be made applicable or not is declared by the Missouri constitution to be a judicial question despite any legislative assertion to the contrary.

The usual view is that such prohibitions as the above, of local or special law, do not apply to in-

[15] Hocking Valley Coal Co. *v.* Rosser, 41 N. E., 263, at pp. 265, 266.

[16] Pa. C., 3, 7; Ind. C., 4, 23; Ill. C., 4, 22; Kan. C., 2, 17; Neb. C., 3, 15; Md. C., 3, 33; W. Va. C., 6, 39; Ky. C., 59; Mo. C., 4, 53; Ark. C., 5, 25; Tex. C., 3, 56; Cal. C., 4, 25; Nev. C., 4, 21; Col. C., 5, 25; Ga. C., 1, 4, 1; Ala. C., 4, 23.

validate laws affecting all the members of any class alike, but only to laws affecting particular persons, or all persons in a particular locality. They have consequently only an indirect bearing upon general class legislation. But the constitutions of several states have the provision more precise, specially affecting labor; as that "the legislature shall pass no local *or special* law regulating *labor*, trade, manufacturing, mining, or agriculture."[17] Possibly this word "special" may extend the prohibition to legislation for special classes of laborers, as well as special localities.

Such is the wording of the constitutional provisions; and with all deference to the opinions of these high courts, the writer would submit the view that these four cases, while undoubtedly well decided upon the freedom of contract point, should stand upon that point alone. No one of the laws (except in so far as the Ohio law was restricted to railroads more than thirty miles long) fairly presents a case of class legislation. They all applied to all members of the general class of industrial laborers alike throughout the state; and the discrimination between such labor and farm or domestic labor carried its reason on its face; it was surely not an arbitrary distinction within the meaning of Cooley's well-known

[17] Pa. C., 3, 7; Ky. C., 59; Mo. C., 4, 53; Tex. C., 3, 56; La. C., 46.

definition.[18] Otherwise the statutes above cited of Maine, Pennsylvania, Wisconsin, Indiana, and Illinois, which all except farm or domestic labor, and many similar laws, quoted below in §§ 13, 14, must be held unconstitutional also. The true doctrine would seem to be that a law is not class legislation which applies to all the members of the class alike, and where it rests on no arbitrary ground, but carries upon its face some reason of public health, safety, or morality, upon which it may be defended;[19] and the distinction between indefinite employment, like that of a domestic servant, and the definite hours of a factory or workshop, or even general mechanical labor, is surely such a reason. But the

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[18] Cooley, Const. Lim., *393.

Thus, a statute allowing pedlars' licenses to be issued only to lame persons, was held to involve an arbitrary distinction, and declared unconstitutional in Pennsylvania. Britain's Case, 36 P. L. J., 17.

And in Michigan a libel law applying only to newspapers, and exempting them from liabilities for libels to which ordinary persons were still subject, was declared unconstitutional for the same reason. Park *v.* Free Press Co., 72 Mich., 560.

And finally, the case of State *v.* Julow, 31 S. W., 781 (see § 53), held clearly that any discrimination in a statute between union and non-union men made it unconstitutional as class legislation.

See also §§ 3, 4, 15, 20, 21, 23, 25, 32, 39, 52, 57, 61, 62.

[19] See, however, Wheeling Bridge Co. *v.* Gillmore, 8 O. C. C., 164, in § 14, below; also Wally's Heirs *v.* Kennedy, 2 Yerger, 554.

liberty of contract, the right to labor, whether of a class or of all citizens, may not be taken away by any legislature; and for this reason the Colorado, Nebraska, Illinois, and Ohio cases were rightfully decided. The statutes above cited of other states should, however, be held valid, and it does not appear that they have yet been questioned in a court of last resort, as they do not forbid or penalize a contract for a longer day; indeed, they all, except the Nebraska statute, expressly recognize contracts for a longer day.

Pay for Overtime.—And it follows that pay for overtime may be demanded, unless the employee has expressly or impliedly contracted for a longer day; and this, in Maine, although the laborer has been paid, by the day, in full and given receipts.[20] He will be deemed to have so contracted when he had actual knowledge that such longer time was required by the employer, either by actual notice or by the general usage of the trade. Thus it was held that a night-watchman at car stables, or the engineer of a flouring mill could not recover extra pay for service for more than ten hours;[21] nor a photogra-

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[20] Bachelder *v.* Bickford, 62 Me., 526. In Florida there is an express statute, that in the absence of a *written contract* for overtime the employee is entitled to extra pay: R. S., 2118.

[21] Bartlett *v.* Street Ry. Co., 82 Mich., 658. Helphenstine *v.* Hartig, 5 Ind. App., 172.

pher's assistant paid by the week for "finishing" photographs;[22] nor a manager of gas-works paid by the week, though he worked sixteen hours a day, the nature of the business requiring it.[23]

And in other states the statute has been construed still more strictly, and pay for overtime cannot be demanded *unless* contracted for, or clearly implied from the circumstances;[24] that is, neither extra labor nor extra pay can be demanded without a special contract. The workman may stop work at the end of the legal day, but if he choose to go on he cannot, in the absence of agreement, charge for overtime. So, on the other hand, if he work by the day, but *less* in all on the average than the legal day, if each day's work was accepted as such, the employee may sue for the full *per diem* amount.[25]

§ 12. **Public Labor Hours.**—But many states have passed laws prescribing the hours of labor as to skilled or unskilled labor employed directly by the state, or any county, city, town, or municipal corporation, or even by private contractors upon public work, or for such municipal corporations. Such laws are generally consti-

[22] Schnurr *v.* Savigny, 85 Mich., 144.

[23] Luske *v.* Hotchkiss, 37 Ct., 219.

[24] McCarthy *v.* Mayor of N. Y., 96 N. Y., 1; Luske *v.* Hotchkiss, 37 Ct., 219; Ind. Stats., 1889, p. 143.

[25] Brooks *v.* Cotton, 48 N. H., 50.

tutional, as they merely prescribe the kind of contract the state, or its municipal corporations, shall make, and so the federal law was interpreted by the United States Supreme Court;[1] but when they go further, and impose a penalty upon a private person, whether laborer or employer, or make it a misdemeanor or criminal offence for such employer to make contracts, voluntary on both sides, with his own workmen for a longer time, their constitutionality seems more open to doubt; it has been indignantly denied by the Supreme Court of California,[2] and affirmed by that of New York[3] and (of a federal law) in the federal courts.[4]

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[1] U. S. *v.* Martin, 94 U. S., 400.

[2] Kuback's Case, 85 Cal., 274. And this case was so decided in spite of the statute and constitutional provision making eight hours a legal day in all public work, and requiring city contracts to be so made. The law creating the misdemeanor for which Kuback was indicted was a city ordinance.

[3] N. Y. Laws, 1891, 105, 504; People *v.* Warren, 28 N. Y. Sup., 303. The case is ill considered, however, and is in effect destroyed by the decision of the Court of Appeals upon a *habeas corpus* brought by Warren, that the statute was not penal, but directory merely; and "could not be the basis of a criminal indictment for misdemeanor," whereby defendant was released, and it became unnecessary to consider its constitutionality. People *ex rel.* Warren *v.* Beck, 144 N. Y., 225.

[4] The validity of the statute was not really passed upon, however, the court holding that the defendant did not come within its terms. U. S. *v.* Ollinger, 55 F. R., 959. And in

Thus, in some states eight hours is made the prescribed legal day in all labor employed by the state or any municipal corporation;[5] in others nine hours.[6] In California, Idaho, and Wyoming the former time is prescribed in the constitution. And in all these states but Texas the prescription applies to all work done by contractors, etc., for the state or on public works. And in New York, California, Indiana, Kansas, and Colorado, to exact or require employment for a longer time subjects the employer to a fine, or even renders him guilty of a misdemeanor or criminal offence, and, at the option of the state, forfeits his contract.[7]

Wages.—In Massachusetts a law provides that cities shall pay laborers weekly (compare §§ 10, 21) at a rate not *exceeding* $2 per day.[8]

Contract.—And the California code provides that all labor on public buildings of the state,

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another case in the Supreme Court the statute was held directory merely. U. S. *v.* Martin, 94 U. S., 400.

[5] N. Y., 1870, 385; Ind., 1889, p. 143, § 2; R. S., 7053; Kan., 1891, 114; Cal., 1893, 113; Cal. Const., 20, 17; Pol. C., 3245; Ida. Const., 13, 2; Wy. Const., 19, 1; Utah, 1894, 11; U. S. R. S., 3738.

[6] Mass., 1890, 375; 1894, 508, 8; Tex., 1879, 137.

[7] N. Y., 1870, 385, 4; Kan., 1891, 114, 3; Col., 1893, 113, 3; Ind. R. S., 7054.

[8] Mass., 28, 12. For a discussion of the validity of such laws, if actually fixing the rate, see § 10. The weekly payment part of the law is unquestionably valid.

skilled or unskilled, must be employed by the day, and no such work done by contract.[9] And "every person who employs laborers upon the public works, and who takes, keeps, or receives any part or portion of the wages due to such laborers from the state or municipal corporation for which such work is done, is guilty of a felony."[10]

§ 13. **Hours of Labor, Women and Minors.**— But in the case of women and children, nearly all the states regulate the hours of labor, at least in factories and workshops, mechanical, manufacturing, or industrial occupations;[1] usually to ten hours (in Pennsylvania, twelve hours) a day, or sixty hours a week,[2] but in Massachusetts, to

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[9] Cal. Pol. C., § 3233. The provision is ridiculous, but not unconstitutional.

[10] Cal. P. C., 1872, April 1, § 1. This provision is possibly unconstitutional. *Ex parte* Kuback, 85 Cal., 274.

[1] The phrase covers "any factory or workshop," O., Wis., Minn., Dak., Okla., or warehouse, etc.; La., "Any manufacturing or mechanical establishment;" Mass., Me., N. H., Wis., Minn., Dak., Ga., Okla., "Any manufacturing establishment;" R. I., N. Y., Pa., Va., Md., "Any manufacturing, mechanical, or mercantile establishment;" Ct., Cal., Mich., "Cotton or woollen factories;" Ind., S. C., Ga., "Any manufacturing or renovating establishment or mercantile industry; Pa., "Any factory;" N. J., Va., "Manufacturing establishments and machine shops;" Ga.

[2] Mass., 1894, 508, 10; Me., 1887, 139, 1; N. H. P. S., 180, 14; R. I., 1885, 519, 1; Ct. G. S., 1745; N. Y., 1886,

fifty-eight hours a week; in South Carolina and Georgia, to eleven hours, or sixty-six a week in cotton and woollen factories; and in Wisconsin (in Alabama, this law was repealed in 1895) to eight hours a day; [3] and in such cases no voluntary contract for overtime is permitted by the law,[4] and the employer permitting, or compelling overtime, or the employment of women or minors, contrary to the statute, is commonly subject to a fine, or guilty of a misdemeanor.[5] In Georgia the hours in all other employments are from sunrise to sunset, usual meal times allowed. [6]

This statute applies to *all* women and to all minors under eighteen (Mass., N. H., Wis.,

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409; 1892, 673, 1; N. J. Rev., p. 485, § 18; Pa., 1893, 244, 1; Dig., p. 865; O. R. S., 6986 aa; Ind. R. S., 2336; Mich., 1997, a 5; 1895, 184, 1; Minn. G. S., 24, 1; Cal., 1889, 7, 1; Va., 1890, 193, 1; La., 1886, 43, 4; Md., 27, 139; Dak. P. C., 739; Okla., 1893, 2550; S. C., 1882, 39; Ga., 1889, 599.

[3] Wis., 1883, 135. The Illinois Statute (Ill., 1893, p. 99) to the same effect has been declared unconstitutional: Ritchie *v.* Illinois, 155 Ill., 98.

[4] But in some states the statute expressly allows voluntary contract for overtime by persons over eighteen, Me., Wis., Okla.; by persons over fourteen, Minn., Dak.; by males over eighteen, and females over twenty-one, Mich.

[5] Mass., ib., § 60; N. H., ib., § 16; N. Y., ib., § 21; Ct.; Me., ib., 3; R. I.; N. J.; Pa.; Ill., 1893, p. 101, 8; Mich.; Minn.; Va., ib., 2; Md., 27, 140; Wis.; Ind.; Cal.; Dak.; Okla.; La. But see note 4.

[6] Ga. Code, 1885.

Minn., La., Dak., Okla.); to all women and all minors under sixteen (R. I., Ct., Me.); to all women under twenty-one, and minors under twenty-one (N. J., Pa., Ga.); to all women under twenty-one, and minors under eighteen (N. Y., Mich.); to all women under eighteen, and minors under eighteen (O., Cal., Ind.); to both sexes under sixteen (Md.); to all women and to children under fourteen (Va.); to *all* persons in cotton and woollen factories (S. C., Ga.).

And out of this labor period, one hour each day must be taken for dinner,[7] or in other states forty-five minutes.[8] No women and no minors under eighteen (N. Y.), or twenty-one (Mass.), shall be employed in factories between 10 P.M. and 6 A.M., in Massachusetts, or 9 P.M. and 6 A.M., in New York.[9] So half an hour for a meal must be given, after any six hours' time, in Massachusetts; and all children and women, five in number, employed in the same factory, must be allowed their meal time at the same hour.[10] Employees working overtime after 6 P.M. must be given twenty minutes for lunch.[11]

[7] N. Y., 1893, 173, 1; La. But the factory inspector may give a written permit for a shorter meal time: N. Y., Pa., Mich.

[8] Pa., ib., 11; Mich., 1895, 184, 11.

[9] Mass., ib., 12; N. Y., 1890, 398, 1.

[10] Mass., ib., 26, 27, 28. This rule may be suspended in special kinds of factories by the chief of police, with the approval of the governor.

[11] N. Y., 1893, 173, 1.

A different apportionment of hours per day is, however, allowed in some states for the sole purpose of making a shorter day's work for one day in the week,[12] or to make up for time lost by stopping of machinery,[13] or when necessary to make repairs to prevent interruption of its ordinary running.[14] And in Maine, "nothing in this act shall apply to any manufacturing establishment or business the materials or products of which are perishable, and require immediate labor thereon to prevent decay or damage." [15]

For laws limiting women's labor in special occupations, see § 15.

Children. (See also § 16.)—The hours of labor of younger children are usually further regulated by stricter laws, and in some states an age is prescribed within which they may not, under penalty to the employer, or guardian, be employed at all in workshops and factories, or mechanical and manufacturing occupations.[16] This age is fixed at ten in New Hampshire, Vermont, and California;[17] at twelve in Maine, Rhode

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[12] N. H., Mass., Me., R. I., Ct., N. Y., Cal., Mich., ibid.

[13] N. H., Mass., R. I., Ct., Me., ib., § 2, Ga.

[14] N. H., Me., R. I., Ct., Cal., Pa., Mich.

[15] Me., 1887, 139, 10.

[16] In some states the prohibition is extended to mercantile establishments also: Mass., Ct., R. I., Ill., W. Va., Tenn., Cal. For mines, see also § 15.

[17] N. H., 93, 10; Vt. Stats., 5146; Cal., 1889, 7, 2.

Island, Ohio, Wisconsin, West Virginia, Tennessee, and by the constitution of North Dakota,[18] at twelve for boys and fourteen for girls; in New Jersey and Louisiana,[19] at thirteen for both in Massachusetts and Pennsylvania;[20] at fourteen, in Connecticut, New York, Illinois, Michigan, Wisconsin,[21] Colorado.[22] A female of eighteen, or male of sixteen, may, in Maine, contract for overtime on extra compensation with the parent's or guardian's consent.[23]

Several states define the age of a "minor," "child," or "young person" for purposes of this section.[24] (See also above.) So a "manufacturing establishment" sometimes is defined to mean a place where five persons (in Pennsylvania,

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[18] Me., 1887, 139, 5; R. I., 1894, 1278; W. Va., 1891, 15; Tenn., 1893, 159; N. D. Const., 209; O. R. S., 6986; Wis. R. S., 1728; 1891, 109.

[19] La., 1886, 43; N. J. Sup., p. 407, § 9.

[20] Mass., 1894, 508, 13; Pa., 1893, 244, 2; Dig., p. 865.

[21] Children between twelve and fourteen may be employed upon permit of the county judge: Wis., 1891, 109, and so in Ohio, "not more than eight hours a day, during vacations, in such employments as the state factory inspector may find not detrimental to the health of the child." O., 1891, p. 396.

[22] Ct., 1895, 118; N. Y., ib., 2; Ill., 1893, p. 100, 4; Wis., 1891, 109; Mich., 1895, 184, 2; Col., 1887, p. 76.

[23] Me., 1887, 139, 1.

[24] Thus a "minor," in Massachusetts and New York, for purposes of this section, is a person under eighteen (N. Y., 1886, 409, 3; Mass., ib., 57), and in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri,

Michigan), five women or children (in Rhode Island), or three persons (Wisconsin), or one person (New York), are employed; and a "factory" to mean any premises where steam, water, or mechanical power are used in aid of manufacturing (Massachusetts).

A "manufacturing establishment," any place as above where goods or products are manufactured, repaired, cleaned, or sorted, in whole or in part,[25] or "any factory, workshop, mine, or establishment, where the manufacture of any goods whatever is carried on."[26]

So in many other states no child under sixteen (or a similar age) can be permitted[27] to labor more than ten hours a day in such factories or mercantile establishments, and such employment is a misdemeanor.[28] No child under

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Arkansas, California, Oregon, Nevada, Washington, and Idaho a woman ceases to be a minor at eighteen.

A "child," in Massachusetts, is a person under fourteen.

A "woman" is a woman of eighteen and upward.

A "young person" is anyone between fourteen and eighteen.

[25] N. Y., 1889, 560, 4; Pa., ib., 4; Ill., 1893, p. 101, § 7; R. I., 1894, 1278, 2; Wis., 1728; Mich.

[26] N. J. Sup., p. 407, § 9.

[27] In some states the word is "compelled": Minn.

[28] The law as in the text exists in the following states: Me., 48, 15; 1887, 139, 1; N. J. Sup., p. 772, § 20; Minn., 1893, 96. In Indiana the age and time limit, respectively, is fourteen and eight hours. In Maine, females over eighteen,

thirteen can, in Massachusetts, be employed on any indoor work for wages, or in any manner during public school hours, unless during the year previous he has attended school for at least thirty weeks (see § 16); and no child under fourteen, in factories, etc., except during vacation, unless he have procured an employment ticket, etc. (see § 16), showing that he can read and write and has attended school for thirty weeks during the year preceding.[29] In Nebraska no child under twelve can be employed in shops, factories, etc., more than four months in a year.[30] And in Massachusetts no minor under eighteen shall be employed in laboring in any mercantile establishment more than sixty hours in a week.[31] "No boss or other superior in such establishment shall inflict corporal punishment upon such minor laborers; and the owners of such factory or machine-shop shall be directly liable for all such conduct on the part of their employees; and such minor may sue in his own name for dam-

and males over sixteen, may not contract for excess labor over six hours a week, or sixty hours in a year. In Vermont the limits are fifteen years and ten hours; in Wisconsin, Dakota, and Oklahoma, fourteen and ten hours. Ind., 1893, 78; R. S., 2238; Vt., 5146; Wis., 1728; Dak. P. C., 739; Okla., 2550.

[29] Mass., 1894, 508, 13, 14, 16.

[30] Neb. Cr. C., 245 aa.

[31] Mass., 1894, 504, 10.

ages for such conduct, and the recovery shall be his own property, and not belong to his parents." [32]

There is a common provision that, for purposes of this section and §§ 14 and 16, a certificate signed and sworn to by the parent or guardian may be accepted by the employer as evidence of the child's age, so as to exculpate him from penalties, etc.[33] And sometimes certificates of the child's health, ability,[34] or educational qualifications [35] may be demanded by the factory inspectors or must be required by the employer. And in cases of women and children operatives, it is generally required that employers shall post in every room a printed notice stating the number of hours' work required on each day, the hours of commencing and stopping, and the hours for meals.[36] And usually a list or record of all children under certain ages so employed must be kept and posted in the factory or workshop;[37] or kept for the state inspectors, etc.[38]

[32] Ga. Code, 1886.

[33] N. H., 180, 17; Mass., 1894, 508, 16, 61; Me., ib., §§ 3, 8; R. I. P. S., 169, 2; Ct., ib.; N. Y., ib., 2; N. J. Sup., p. 409, § 18; Pa., ib., 2; Ill., 1893, p. 100, § 4; Mich., 1895, 184, 3; Tenn., 1893, 159; Cal., 1889, 7, 2.

[34] See § 17, note 9.

[35] See § 16.

[36] N. H., 180, 15; Mass., ib., 11; Me., ib., 2; R. I., Ct., N. Y., Pa.; O., 6986 aa; Ill., 1893, p. 99, § 6; Cal., 1889, 7, 3.

[37] N. Y., ib., 2; Ill., 1893, p. 100, §§ 4, 6; Pa.

[38] R. I., 1894, 1278; Mass., 1894, 508, 16; Mich.; O., 6986 aa, Cal.

A printed form of such notice shall be furnished by the chief of the district police, and approved by the attorney-general in Massachusetts and Maine.

And finally, a few states have laws limiting child labor in any occupation. Thus, in California (P. C., § 651), "Every person having a minor child under his control, either as a ward or an apprentice, who, except in vinicultural or horticultural pursuits, or in domestic or household occupations, requires such child to labor more than eight hours in any one day, is guilty of a misdemeanor."

No child under sixteen (in Minnesota), or fourteen (in Massachusetts), may be employed to labor outside the family (in Minnesota) in any manner between 6 P.M. and 7 A.M.[39]

"The selectmen shall inquire into the treatment of minors employed in manufacturing establishments, and if the education, morals, health, food, or clothing of any such minor is unreasonably neglected, or he is treated with improper severity, or compelled to labor at unreasonable times or manner, they may, if such minor has no parent or guardian residing in the state, discharge him from such employment, and with his consent bind him out as an apprentice."[40]

[39] Mass., 1894, 508, 14; Minn. P. C., 250.

[40] Vt., 2838.

"Whoever hires or employs, or causes to be hired or employed, any minor, knowing such minor to be under the age of fifteen years, and under the legal control of another, without the consent of those having such control for more than sixty days, is guilty of a misdemeanor." [41]

It is made a misdemeanor to employ and carry beyond the limits of the state any minor without his parent's consent.[42]

The constitutionality of the above statutes, in so far as they apply to minors, is undoubted; it rests on the principle of the parental position of the state toward persons not citizens and not able to contract for themselves.[43] As to women, it has been placed upon the same ground in the past and for that reason, and because of the peculiar provision in the state constitution, was sustained in Massachusetts.[44] On the other hand, it has, by a late decision most ably rendered, been denied in Illinois.[45] It seems clear that, under the modern view that women are citizens, capable of making their own contracts, particularly in states where they have the right of suffrage, such legislation restricting their hours of labor is unconstitutional, both on ordi-

[41] Fla., 2733. [42] N. C., 1891, 45.

[43] People *v.* Ewer, 141 N. Y., 129. Adam Smith, "Wealth of Nations," Bk. I., Ch. 10.

[44] Commonwealth *v.* Hamilton Mfg. Co., 120 Mass., 383.

[45] Ritchie *v.* Illinois, 155 Ill., 98.

nary grounds of denying them the right to contract,[46] and as class legislation of the worst sort; for such privileges, or restrictions (and they would most probably be deemed the latter), cannot be conferred or imposed upon women and not on men.[47] Only in New Hampshire, Massachusetts, Rhode Island, Connecticut, Maine, Illinois, Wisconsin, Minnesota, the Dakotas, Virginia, Oklahoma, and Louisiana does the statute apply to women of full age; and in Maine, Michigan, Minnesota, Dakota, and Oklahoma it expressly allows them to contract for overtime. This may save the statute in these states; but it is probable that in the others, except possibly in New England, it will be held unconstitutional, as it has been in Illinois.

§ 14. **Hours of Labor, Special Occupations.**— In a few other states there are general laws limiting hours of male or female labor applying only to factories or special occupations. Thus only in any manufacturing or mechanical business is eight hours made a day's work, in the absence of special contract, in Wisconsin and Ohio, and ten hours in Minnesota; eight hours in Ohio, in mining also;[1] in Rhode Island[2] ten

[46] For a full discussion of this question, see §§ 1–3.

[47] Re Leach, 134 Ind., 665; Minor *v.* Happersett, 21 Wall., 162.

[1] O. R. S., 4365; Wis. R. S., 1729; Minn. G. S., 24, 2.

[2] R. I. P. S., 169, 26.

hours is a day's work "in any manufacturing establishment, and all mechanical labor," and so in Michigan in "factories, workshops, salt blocks, saw-mills, logging or lumber camps, looms or drives or other places used for mechanical, manufacturing, *or other purposes, where men or women are employed.*"[3] This seems broad enough to include all cases, perhaps even agricultural labor, and we have accordingly noted it in § 11. This statute does not in Wisconsin apply to labor by the week, month, or year. So factory labor of men (for a definition of *factory*, see § 13) is limited, in the absence of contract, to ten hours a day in New Jersey[4] and Maryland[5] and eleven hours, or sixty-six hours a

[3] Mich., 1885, 137; 3 Howell Stats., 1997 a 5.

[4] In all cotton, woollen, silk, paper, glass, and flax factories, and in manufactories of iron and brass. N. J. Rev., 1877, page 485, 17.

[5] To the effect that no corporation or manufacturing company engaged in manufacturing cotton or woollen yarns, fabrics or domestics of any kind, and no person or firm owning or operating such corporation or company within the state, or any agent thereof, . . . shall require or permit its employees to work more than ten hours a day, . . . and shall make no contract with them providing for more than ten hours' work, except that male employees above twenty-one may make contracts to work by the hour for such time as may be agreed upon, or without contract may work for the purpose of making repairs and improvements, and getting steam up and machinery ready, etc., and have extra compensation. Md., 1888, 100, 1 and 2; Pub. Laws, 100, 142.

week in South Carolina and Georgia,[6] and in both these states contracts for overtime are declared void (but this provision probably renders the statute unconstitutional; see § 11).

Mines.—In the absence of special contract, ten hours in Maryland is (by a local law) declared a day's work in mines; so eight hours in Ohio (probably unconstitutional; see below), and by the Wyoming constitution.[7]

Railroads.—Ten hours in New York, Ohio, Michigan, and Minnesota is declared a day's work

[6] S. C., 1892, 39; Ga., 1889, p. 163. The law reads: "The hours of labor required of all persons employed in all cotton or woollen manufacturing establishments in this state, except engineers, firemen, watchmen, mechanics, teamsters, yard employees, clerical force, and all help that may be needed to clean up and make necessary repairs or changes in or of machinery, shall not exceed eleven hours per day, or the same may be regulated by employers, so that the number of hours shall not in the aggregate exceed sixty-six hours per week: *Provided*, That nothing herein contained shall be construed to prevent any of the aforesaid employees from working such time as may be necessary to make up lost time, not to exceed ten days, caused by accidents or other unavoidable circumstances.

"All contracts made or entered into, whereby a longer time for labor than is provided in the foregoing section of this act shall be required of said employees, herein before described, shall be absolutely null and void, so far as the same relates to the enforcement of said contracts with said employees, any law, usage, or custom to the contrary notwithstanding."

[7] Md. Local Laws, 1884, 427, etc.; O., 4365; Wy. Const., 91, 1.

for all classes of steam railroad employees;[8] and so as to street railways, in New York, Massachusetts, Michigan, and Washington,[9] and such work must, in all these states except Minnesota and Washington, be performed within twelve consecutive hours. In Pennsylvania, Maryland, California, Louisiana, and New Jersey[10] the statute fixes twelve hours for street railways; and the statutes usually require extra pay for overtime, and make the employees infracting their provisions guilty of a misdemeanor. The constitutionality of all of them may be questioned.

In Massachusetts, Pennsylvania, and California contracts for a longer time are declared void, and in the latter states the company so contracting is liable to a penalty. The constitutionality of this part of the statute can probably be sustained in Massachusetts under the police power, as a regulation for the safety of the public; but in California, as it is only void at the

[8] N. Y., 1892, 711; O., 1890, p. 112; Mich., 1893, 177; Minn., 1891, 17. But the statute was declared unconstitutional in Ohio. (See below, in the text.)

[9] N. Y., 1887, 529; Mass., 1894, 508, 9; Mich., *ib.*; Wash., 1895, 100.

[10] N. J., 1887, 112; Pa., 1887, 10; Md., 27, 142; Cal. Pol. C., 3246 (Sup't); La., 1886, 95. In New Jersey it must be twelve consecutive hours, with half-hour intervals for meals.

option of the employee, it seems more questionable. Moreover the statute there prescribes thirty cents an hour pay for overtime, which is clearly unconstitutional.

But on holidays, and in case of accidents, extra labor may, in Massachusetts, be performed for extra pay.

Railroad employees may not, by the laws of several states, be compelled to work more than twelve,[11] fifteen,[12] eighteen,[13] twenty,[14] or twenty-four[15] continuous hours without an eight-hour rest (in New York, Colorado, and Ohio), or ten hours (in Georgia), or an indeterminate period of rest, as until the next day (Minnesota and Colorado). Except, in Georgia, where the train is detained.

Brickyards and Stationary Engines. — Ten hours exclusive of meal times, in brickyards owned or operated by corporations, is declared a legal day by a New York statute of 1893; and in Montana, eight hours for stationary engineers.[16]

The constitutionality of such laws has been

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[11] Ga., 1891, p. 186.

[12] O., 1892, p. 311. This part of the act was sustained by the court; see below.

[13] Minn., 1885, 206; Col., 1891, p. 284.

[14] Minn., 1891, 17.

[15] N. Y., 1892, 711, 1.

[16] N. Y., 1893, 691; Mon., 1893, p. 67.

fully discussed above (see §§ 11 and 1–3). Such laws, if sustained at all, must rest on the police power (§ 4), and must clearly be both intended and adapted to secure the safety of the public. It is easy to see that such statutes as those referred to above, which provide for a necessary rest for railroad employees after long periods of service, are necessary to the public safety, and no such statute has yet been set aside by the courts; but statutes making it illegal for men to work more than eight or ten hours a day, or such brief period as is clearly not necessary for the public safety, especially when the employer is made guilty of a criminal offence who suffers overtime even by voluntary contract, would be held unconstitutional both on the ground that they interfere with the liberty of contract of the employee and the property rights of the employer, and would probably also in most states come under the prohibition of class legislation (see §§ 2, 11); and the Supreme Court of Ohio has just set aside the statute limiting work by employees of a mine or railroad to ten hours a day; while the other branch of the statute, which required eight hours' rest after twenty-four consecutive hours' work, was sustained.[17]

[17] Wheeling Bridge Ry. Co. *v.* Gilmore, 8 Ohio C. C., 658. The opinion also contains the following words: "Statutes may be, and they sometimes are, held to be unconstitutional, although they contravene no express word of the constitution.

The law (March 26, 1890) made it a criminal offence for a railroad company to permit or require any employee to work more than ten hours, and further provided that he should receive extra pay for overtime, and both these provisions were held unconstitutional. The court did not put it only on the narrow ground of class legislation, and further expressly held that the fact that the law applied only to corporations made no difference, that private corporations are regarded as persons within the meaning of the constitutional guarantees, and took the familiar ground that the liberty of making contracts is absolutely essential to the acquisition, possession, and retention of property, the right to which is guaranteed by § 1 of the Bill of Rights of the Ohio constitution.[18]

§ 15. **Women's and Children's Hours in Special Occupations.**—(For factories generally, stores, workshops, etc., see § 13.) *Mines.*—By the laws or constitutions of Pennsylvania, Indiana, Wyoming, West Virginia, and Washington no women

Where they strike at the inalienable rights of the citizen, so as to infringe the spirit of the instrument, though not its letter, they are ofttimes held to be unconstitutional." (Compare § 1, above.)

"In this instance, in our opinion, this act infringes directly both the spirit and the letter of the constitution."

[18] See, to the same effect, People *v.* Phyfe, 136 N. Y., 554.

can be employed in mines at all, under penalty.[1] And in several states no children under fourteen or a neighboring age.[2] And no child more than four months in a year, in Nebraska.[3] In Kansas no minor between twelve and sixteen who cannot read and write.

Factories.—In manufactories of steel, metal, machinery, or tobacco no child under fourteen may be employed, in Indiana.[4] In cotton, woollen, silk, paper, bagging, and flax factories no male or female under twenty-one can under contract be employed more than sixty hours a week, or an average of ten hours a day, in Pennsylvania (compare § 13); and no minor under thirteen may be employed about such factories, nor under sixteen more than nine months a year, and who has not attended school for three months in the year.[5]

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[1] Pa. Dig., pp. 902, 1351; Ind., 1891, 49; W. Va. Code, p. 997, § 13; Wy. Const., 9, 3; Wash., 1891, 81, 12.

[2] Such age is fourteen: Pa. Dig., pp. 1016, 1351 (in anthracite coal mines); O., 1891, p. 396; Ind.; Col., 1887, p. 76; Ida. Const., 13, 4; S. D., 1890, 112, 11; Wash.; Mon. P. C., 474; Wy., *ib.* Twelve: Col. Const., 16, 2; N. J. Sup., 1886, p. 380, § 18; Kan. G. S., 3861; Io., 1884, 21, 13 (as to boys only); W. Va., *ib.*; Pa. Dig., p. 1372 (in bituminous coal mines). Employment under such age makes it a misdemeanor; Ind. R. S., 2244.

[3] Neb. Cr. C., 245 aa.

[4] Ind., 1893, 78 R. S., 2237.

[5] Pa. Dig., p. 864.

We are now prepared to present the laws upon labor hours intelligibly in a table (see following page).

§ 16. **Educational Restrictions on Minors.** — Nearly all the states specially impose restrictions upon the employment of children who cannot read and write, or so as to conflict with their common-school attendance; and the same effect is generally produced by the compulsory school attendance or truant laws. It is impracticable to cite such statutes in detail; but we may note their general effect. Thus, in many states no child under sixteen or fourteen who cannot read and write may be employed in any manufacturing, mechanical, or mercantile establishment;[1] except during vacations of the public schools;[2] except when a certificate is obtained from the school committee that such minor's labor is necessary to the support of the family.[3]

And in some states no child of any age, who cannot read and write, unless he attend day schools or evening schools where such are provided.[4]

[1] The age is sixteen (N. H., 93, 11; N. Y., 1892, 673, 2); fifteen (R. I., 1887, 649, 11); fourteen (Vt. Stats., 713; Mass., 1894, 508, 24; La., 1886, 43, 2); thirteen (Wis., 1889, 519).

[2] N. Y., *ib.*, Vt., N. H.

[3] Mass., *ib.*, 25.

[4] Mass., 1894, 508, 17, 25; O., 1889, p. 333, 3 (of minors from fourteen to sixteen who cannot read English).

TABLE OF LEGAL HOURS OF LABOR FOR ALL THE STATES.

STATE.	General Labor Day in the Absence of Contract (except Agricultural and Domestic).	Labor Day in State or Public Labor.	Compulsory Labor Day for all Women in Factories. (If Contracts for Overtime allowed, it is so noted.†)	Compulsory Labor Day for Women under Age in Factories.	Compulsory Labor Day for Male "Young Persons" in Factories.	Labor Day for Children in Factories.	Age below which Factory Employment of Children is Forbidden.	Special Laws for Men, Women, and Children in Mines.
				Women under	From .....to	Under		Women, Child'n
N'w Hampsh.	10 hours.	.....	10 hrs., 60 a wk.	21	21–18, no limit.	18, 10 hrs.	10	.....
Massachu'etts	.....	9 hours.	10 hrs., 58 a wk.	21	21–18, no limit.	18, 10 hrs.	13	.....
Maine	10 hours.	.....	10 hrs., 60 a wk.‡	18, 10 hrs., 60 w.	21–16, no limit.	16, 10 hrs.	12	.....
Vermont	.....	.....	.....	.....	.....	15. 10 hrs.	10	.....
Rhode Island	.....	.....	10 hrs., 60 a wk.	21	21–16, no limit.	16, 10 hrs.	12	.....
Connecticut	8 hours.	.....	10 hrs., 60 a wk.	21	21–16, no limit.	16, 10 hrs.	14	.....
New York	.....	8 hours.	.....	21, 10 hrs., 60 w.	21–18, no limit.	18, 10 hrs.	14	.....
New Jersey	.....	.....	.....	21, 10 hrs., 60 w.	21–10, 10 hours.	14, 10 hrs.	10	c. 12
Pennsylvania.	8 hours.	.....	.....	21, 12 hrs., 60 w.	21–12, 10 hours.	10 hours.	13	w. not; c. 14
Ohio	.....	.....	.....	18, 10 hrs., 60 w.	21–18, no limit.	18, 10 hrs.	12	c., 14
Indiana	8 hours.	8 hours.	.....	18, 10 hrs., 60 w.	21–18, no lim. / 18–14, 10 hrs.	14, 8 hrs.	none.	w. not; c. 14
Illinois	8 hours.	.....	[8 hours.*]	[8 hours.*]	.....	.....	14	.....
Michigan	10 hours.	.....	.....	18, 10 hrs., 60 w.	21–18, no lim. / 18–14, 10 hrs.	18, 10 hrs.	14	.....
Wisconsin	.....	.....	8 hours.‡	18, 8 hours.	21–18, no lim.	18, 10 hrs.	14§	.....
Iowa	.....	.....	.....	.....	.....	.....	none.	boys, 12
Minnesota	.....	.....	10 hrs., 60 a wk.‡	18, 8 hours.	21–18, m. no lim.	18, 10 hrs.	none.	.....
Kansas	.....	8 hours.	.....	.....	.....	.....	none.	c. 12
Nebraska	10 hours.	.....	.....	.....	.....	.....	12, not more than 5 mos. in the year.	4 mos. only.
California	8 hours.	8 hours.†	.....	18, 10 hrs., 60 w.	21–18, m. no lim.	18, 10 hrs.	10	.....

Oregon						none.	
Nevada						none.	
Colorado	8 hours.					14	c. 12 †
Washington						none.	w. not ; c. 14
N. Dakota		10 hrs , 60 a wk.‡		18-14, 10 hrs. ‡ / 21-18, m. no lim	14, 10 hrs.	12†	
S. Dakota		10 hrs., 60 a wk.‡		21-18, m. no lim / 18-14, 10 hrs. ‡	14, 10 hrs.	none.	c. 14
Idaho	8 hours.†					none.	c. 14 †
Montana						none.	c. 14
Wyoming	8 hours.†					none.	w. not ; c. 14 †
Utah	8 hours.					none.	
Oklahoma		10 hours.‡	18, 10 hours.	21-18, mal. no lim.	18, 10 hrs.	none.	
Maryland			16, 10 hrs., 60 w.	21-16, mal. no lim.	16, 10 hrs.	none.	m. 10
D. Columbia						none.	
Virginia		10 hrs., 60 a wk.		21-14, mal. no lim.	14, 10 hrs.	none.	
W. Virginia						12	w. not ; c. 12
Kentucky						none.	
Missouri	8 hours.					none.	
Tennessee						12	
Arkansas						none.	
Texas	9 hours.					none.	
N. Carolina						none.	
S. Carolina. } Georgia }		11 hrs., 66 a wk. in certain factories ; see § 14.	Women under 21, 21, sunrise to sunset.	Persons under 21, sunrise to sunset.		none.	
Alabama	(Law repealed ; see 1895, 15.)					none.	c. 15
Florida	10 hours.					none.	
Mississippi						none.	
Louisiana		10 hrs., 60 a wk.		21-18, no limit.	18, 10 hrs.	12 b, 14 g.	
New Mexico						none.	
Arizona						none.	
United States	8 hours.					none.	

* Law annulled as unconstitutional.
‡ If such labor is compulsory, only.

† Provided in the state constitution.
§ Except upon permit of the judge, etc.

In many states also no child or minor of like age can be so employed except during vacations unless they have attended school during a certain prescribed period for the year preceding, varying from twelve to sixteen weeks, or in some states for the whole school year, according to the age of the child.[5]

§ 17. **Further Statutory Restrictions upon Child Labor.**—In several states the employment of children or minors of a prescribed age is specially forbidden as to certain dangerous occupations, such as running elevators,[1] stationary engines, cleaning machinery in motion,[2] or dangerous machinery generally, or in any employment where the child is put in danger of life or limb,[3] or in occupations unwholesome or dangerous to health,[4] without a physician's cer-

[5] N. H., 93, 12; Me., 1887, 139, 6; Vt., 712; Mass., 1894, 508, 13, 14, 17; R. I., 1887, 649, 6; Ct., 2105; N. Y., 1874, 421; Mich., 5174, g. h.; Pa. Dig., p. 864, § 6; O., 1889, p. 333; N. J. Sup., p. 937, § 77; Wis., 1728; Col., 1889, p. 59; N. D., 1890, 62, 143; La., 1886, 43.

[1] Mass., 1894, 508, 32; N. Y., 1892, 673, 3; Pa. Dig., p. 1016.

[2] Mass., *ib.*, 31; Mich., 1895, 184, 3; R. I., 1894, 1278, 6; La., 1882, 60; N. J. Sup., p. 773, § 17.

[3] O., 1890, p. 161, § 9; N. Y. P. C., 292; Ct., 1417; R. I., 97, 1; Pa., *ib.*; Ill., 38, 82; Mich., 1895, 184, 3; Mo., 1895, p. 205; Wy., 1895, 46; Ind. R. S., 2241; Del., 1879, 150, 1; Col., 1885, p. 125.

[4] N. J., 1887, 177, 7; Ct., O., N. Y., Pa., Mo., Wy., Ind., Ill., Mich., R. I.

tificate;[5] and in other states the inspector of factories or chief of police may designate certain employments as so injurious to health of children and thereafter they may not be employed therein.[6] The factory inspectors are in some states given power to demand physicians' certificates of the physical ability of children in all cases of factory or workshop employment.[7]

So there are generally statutes forbidding the employment of children under a certain age in occupations injurious to their morals,[8] under penalty of misdemeanor, etc.; and specially forbidding their employment in theatrical exhibitions or circuses,[9] singing, ragpicking, mendicancy, street music, etc., or begging.[10] The prescribed age in this latter class of employments

[5] N. J.

[6] Mass., 1894, 508, 15.

[7] Ill., 1893, p. 101, § 4; Mich., 1895, 184, 4.

[8] O., 1890, p. 161, § 9; N. Y. P. C., 292; R. I., 97, 1; Ct.; N. J. Sup., p. 195, §§ 24, 26; Ind., Ill., Mich., Mo., 1895, p. 205; Wy., 1895, 46, 1; Pa. Dig., p. 1015; Col., 1885, p. 124.

[9] Mass., 1894, 508, 49; N. H., 265, 3; Ind. R. S., 2242; Pa. Dig., p. 1015; O., 6984; N. Y. P. C., 292; Ill.; Mich., 1998; R. I.; Minn. P. C., 250; Kan., 1889, 104; Ct., Mo.; Cal. P. C., 272; Col.; Mon. P. C., 472; Wy., 1895, 46, 1; Md., 27, 273; D. C., U. S. Stats., 1885, 58; Del., 1879, 150, 2; Ga., 4612 (f) (unless the child have attended school for four months of the year preceding).

[10] R. I., Ct., N. J., N. Y., Pa., Mich., Ind., R. S., 2242; Ill., Kan., Minn., Cal., Col., Mon., Md., Del., Mo., Wy., D. C., La., 1886, 43, 2.

(shows and begging) varies from eighteen to twelve.[11] These laws are, of course, constitutional [12] (see § 13).

Minors are generally entitled to their wages free from any claim on the part of parent or guardians unless the employers are notified.[13] And in Ohio [14] wages may not be retained from minors for alleged negligence or incompetence, nor any guarantee made with such minors.

§ 18. **Further Statutory Restrictions upon Female Labor.**—The clear tendency of the law throughout the United States is to make no distinction in civil, industrial, or social rights between the sexes while reserving the distinction as to political and military rights or duties. All occupations are now thrown open to women and they are generally given full rights of contract. The legal profession remains the only one not

[11] Thus eighteen, in New Jersey and Indiana, as to shows, immoral occupations, etc. So, as to mendicancy, etc., in Pennsylvania; sixteen (R. I., N. Y., Mich., Minn., Cal., Mon., Md., O., R. S., 694; see note 3 above); fifteen (Mass., Pa., Ind., Ill., Del.); fourteen (N. H., O., 1890, p. 161—see note 1 above—Kan., Col., D. C., Mo., Wy.); twelve (Ct., N. J., Ga.). In New York the phrase is "apparently or actually under the age of sixteen." Quære whether this is constitutional.

[12] People *v.* Ewer, 141 N. Y., 129.

[13] See N. Y., 1850, 266; Minn., 1893, 35, for specimen statutes.

[14] O., 1893, pp. 55–57. Compare § 9.

generally thrown open to her by the law; and this exception rests upon the ground that membership in the bar is, in a sense, a political office; in the same manner she is not, except in the woman-suffrage states, required to serve on juries.

There is therefore no necessity for an express statute, yet some states have deemed wise to enact one. Thus, in Illinois, California (by the constitution), and Washington

"No person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex: Provided that this act shall not be construed to affect the eligibility of any person to an elective office."[1]

But "Nothing in this act shall be construed as requiring any female to work on streets or roads, or serve on juries."[2]

But, on the other hand, in a few states we find a statute that "The employment of women is forbidden in houses where liquor is sold at retail.[3] The reasonableness of this law is unquestionable, and hence its constitutionality under the "police power" (see § 4), save in states which have adopted the most radical modern

[1] Ill., 48, 4; Cal. C., 20, 18; Wash., 1890, p. 519.
[2] Ill., 48, 5.
[3] La., 1894, 43; Wash., 1895, 90.

view of the emancipation of the sexes. But in California, for this reason a similar ordinance, passed by the city of San Francisco, was held unconstitutional by the California Supreme Court.[4] On the other hand, it has in Ohio been declared constitutional.[5] And the same remarks apply to the nearly universal law providing under penalty that seats shall be supplied to female employees in manufacturing or mechanical establishments, mercantile establishments, and stores,[6] offices,[7] schools,[8] hotels,[9] restaurants, etc.; and also separate toilet-rooms, screened stairways,[10] and similar provisions for health and decency. The constitutionality of these statutes has never been questioned, and there would appear to be no doubt of it.

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[4] Case of Mary Maguire, 57 Cal., 604.

[5] Bergman *v.* Cleveland, 39 O. S., 651.

[6] N. H., 1895, 16; Mass., 1894, 508, 30; R. I., 1894, 1278, 8; Ct., 1893, 77; N. Y. R. S., p. 1089; N. J. Sup., p. 360; Pa. Dig., p. 902; O., 1891, p. 87; Ind., 1891, 120; 1893, 168; Mich., 1997, b 4; Io., 1892, 47; Minn., 1889, 10; R. S., 2224; Neb. Cr. C., 2450; Mo., 3500, 1891, p. 179; Cal., 1889, 5; Col., 1885, p. 297; Wash., 1890, p. 104; Md. Local Laws, 1888, 398; Del., 1887, 238; Ga., 1889, p. 167; Ala., 1889, 92 (in stores only); La., 1886, 43, 5.

[7] Ind., Minn., Neb., Wash., Md., *ib.*

[8] Neb., Wash., Md., *ib.*

[9] Minn., Mich.; "in any business," Ind., Minn., *ib.*

[10] Mass., *ib.*, 33; R. I., *ib.*; Ct., 2267; N. J. Sup., pp. 773, 21–22; Pa. Dig., p. 866; O., *ib.*; Mich., 1895, 184, 7, 10; Minn., 1893, 77; Cal.

§ 19. **Sundays and Holidays.**—The rights of laborers to rest one day in the week are commonly guaranteed by the ordinary statutes relating to the observance of Sunday, which are practically universal throughout the country, but a few states have special provisions; thus, in California, that "all employers must grant employees one day in seven for complete rest from labor." [1] Besides Sunday or the Jewish Saturday, four states have thus far passsd laws making Saturday for banking purposes a half holiday throughout the year.[2] Nearly all the states have adopted a special holiday called Labor Day, usually the first Monday in September.[3] But in some states it is the first Saturday in September,[4] while in Wisconsin it is fixed by proclamation each year.[5]

§ 20. **Fines and Deductions for Imperfect Work and Injury to Machinery or Goods.**—Two states have so far enacted laws attempting to prevent

[1] Cal., 1893, 41.

[2] Mass., 1895, 415; N. Y., 1887, 289; N. J., 1891, 43; Col., 1893, 102; but in Colorado the law applies in the city of Denver only, and for the three summer months. In Massachusetts the statute only applies for banking purposes.

[3] N. H., 180, 24; Mass., 1887, 263; R. I., 1893, 1212; Ct., 1889, 20; N. Y., 1887, 289; N. J., 1895, 392; Ohio, 1890, p. 355; Io., 1890, 45; Neb., 1889, 92; Del., 1893, 695; Va., 1892, 166; Texas, 1893, 7; Col., 1887, p. 327; Utah, 1892, 13; S. C., 1891, 720; Ga., 1893, p. 115; Ala., 1892, 59; Fla., 1893, 84; Minn. R. S., 7987; 1893, 89; Ore., 1893, p. 103.

[4] Pa., 1893, 138.

[5] Wis., 1893, 271.

the withholding of wages or the imposition of a fine by the employer for imperfect work, and declaring illegal or penal even voluntary contracts between the employer and employee to that effect. That of Ohio[1] simply provides that "whoever, without an express contract with his employee, deducts or retains the wages, or any part of the wages, of such employee for ware, tools, or machinery destroyed or damaged, shall be liable to like punishment and penalties above specified, and shall, in addition thereto, be liable in civil action to the party aggrieved in double the amount of any charges."

In Massachusetts the first act[2] provided that no person or corporation should be entitled to retain any part of the wages of any weaver in its employ by way of fine or deduction for imperfect weaving, except in accordance with a posted list of fines, nor unless such imperfect weaving was due to wilfulness, incapacity, or negligence of the weaver, and the imperfection was discovered when the work was first examined, and was shown to the weaver forthwith, and that the amount so retained should not exceed the actual damage.

In 1891 this act was superseded by a new law,[3] providing that "no employer shall impose

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[1] O., 1891, 319. [2] Mass., 1887, 361.
[3] Mass., 1891, 125.

a fine upon, or withhold the wages or any part of the wages of, an employee engaged at weaving for imperfections that may arise during the process of weaving.

"Any employer who shall violate the provisions of this act shall be subject to a fine of not more than one hundred dollars, and for a second and subsequent violation of this act shall be fined not more than three hundred dollars."

The same year indictments were found against Perry, a woollen manufacturer, and the Potomska Mills, a cotton manufacturing *corporation*, for violation of the statute. The court, by a majority opinion,[4] held that both the quoted sections were unconstitutional, saying that "if the act went no further than to forbid the imposition of a fine by an employer for imperfect work it might be sustained as within the legislative power conferred by the constitution of this commonwealth.[5] . . . There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the Declaration of Rights in the Constitution of Massachusetts enumerates

[4] Com. *v.* Perry, 155 Mass., 117.

[5] Mass. Const., Chap. 1, § 1, Art. 4. For a full discussion of this peculiar constitutional provision see §§ 1 and 2.

among the natural, inalienable rights of men the right 'of acquiring, possessing, and protecting property.' . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

On the same day a similar decision was rendered in the case against the Potomska Mills, which is interesting, as showing that the Massachusetts courts at least, like Ohio, and contrary to Missouri and Rhode Island, recognize no distinction between the power of the legislature to limit the contracts of private persons and those of corporations. Mr. Justice Holmes dissented from the majority of the court in both cases, on the ground that no express provision could be found in the United States or Massachusetts Constitutions, and none implied upon a fair and historical construction, which prevented the legislature from depriving a certian class of a contract right which they might be using for a dishonest purpose; that the legislature were the sole judge of the reasonableness of the law, and the court could know nothing about the matter,[6] citing

[6] The courts are sole judge of the reasonableness of a law under the constitutional provisions of Maine and Massachusetts, that the legislature may make all reasonable laws, etc. (see § 2). Moore *v.* Veazie, 32 Me., 360. But though the legislature may forbid contracts against public policy, or establish regulations under the police power, these being ju-

Hancock *v.* Yaden,[7] and it would seem as if this position had been practically sustained in the later decision rendered by the same court in 1895, as to the constitutionality of a general weekly payment law.[8]

Accordingly, in 1892, a new statute was passed[9] merely providing that imperfections complained of should be pointed out to the person whose wages were to be affected thereby, and this was was substantially re-enacted in a Massachusetts general labor law of 1894,[10] and another statute passed requiring the manufacturers of cotton factories to supply tickets containing specifications with each warp to every weaver paid by the piece, cut, or yard. To these latter statutes there can, of course, be no constitutional objection.

As the Ohio statute quoted above expressly reserves express contracts for such deductions, and the Massachusetts decision has been generally quoted with approval by Western courts, we conclude that the law to-day is that, while possibly a statute forbidding the imposition of

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dicial principles, are not thereby removed from the scrutiny of the courts to see that they are in fact such. Frisbie *v.* U. S., 157 U. S., 160; in re Jacobs, 98 N. Y., 98.

[7] 121 Ind., 366. And see the Slaughter House cases, 16 Wall, 36.

[8] Opinion of Justices, 163 Mass., 589. See hereafter § 21.

[9] Mass., 1892, 410.

[10] Mass., 1894, 508, 55; 1894, 534.

arbitrary fines would be sustained, there can be no law passed forbidding employers to make deductions from wages proportionate to the damage or loss caused by actual imperfect work. The question of damage to tools or machinery might, however, rest on a different basis, that this, being recoverable in an action of tort, could not be set off against an action of contract, and that therefore the employee might recover his wages in full, and leave the employer to his ordinary remedies for such injury.

In other states, in the absence of a statute, the imposition of fines fixed by contract for bad and imperfect work has been sustained, and hence such contracts recognized as legal;[11] and so in England;[12] and they are undoubtedly legal under the common law. The imposition of such contracts may be resisted by the trades-unions, or by laborers individually refusing to assent to them; the legislatures have no power to prohibit them.

[11] "A provision in a written contract of hiring between a railway company and a conductor on its cars provided that if the latter received any fare from any passenger (a fare being five cents) he should be liable to a fine of fifteen dollars, which might be deducted from his wages: *Held*, that the fifteen dollars were intended to be liquidated damages, and not a penalty, and that the agreement for payment of it could be enforced." Birdsall *v.* Twenty-third St. Ry. Co., 8 Daly, 419.

[12] Bowes *v.* Press, 70 L. T. R., 116.

§ 21. **Time of Payment of Employees; Weekly Payment Laws.**—Weekly or fortnightly payment laws have now been enacted in fourteen states;[1] but in most of these states they apply to corporation employers only,[2] in several only to manufacturing companies,[3] or to mining labor. In Ohio the law includes street railways and railroad contractors, but in Massachusetts it does not include steam railroads.

In Wisconsin the law does not apply if there be a written contract to the contrary; while in

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[1] Weekly: N. H., 180, 21; Mass., 1894, 508, 51, 1895, 438; R. I., 1891, 918; Ct., 1749; N. Y., 1890, 388, 1895, 791; Ind., 1893, 114; R. S., 7059 (as to mining and manufacturing companies only); Ill., 1891, p. 213; Wis., 1889, 474; Kan., 1893, 187. Fortnightly: Me., 1887, 134; Pa., 1887, 121; O., 1887, 214; R. S., 8769; Wy., 1891, 82; W. Va. Code, p. 1003, § 2. Monthly: Va., 1887, 391, 1-2; Ind. R. S., 7056; Mo., 2538; Tenn. Ex. Ses., 1891, p. 5. Weekly or monthly: Cal., 1891, 146; in Connecticut eighty per cent. only need be paid weekly, the balance monthly. Ct., 1750.

[2] So in all states above mentioned except Massachusetts, Wisconsin, Maine, Indiana, Pennsylvania, Tennessee, Wyoming. In Massachusetts they apply to all persons, etc., engaged in any manufacturing business, and having more than twenty-five employees, or in Maine, ten; but there is no penalty imposed except upon corporations.

[3] Pa., Ind., O., Va., W. Va.; in New York and Maine they apply to substantially all corporations but street railroads; as to which monthly payments are required in New York, not later than the twentieth of the month.

[4] O., Pa., Mo., 1891, p. 183; Ind., Wy., Va., W. Va.

Indiana contracts in waiver of such rights are expressly declared illegal;[5] and in several the whole law has been declared unconstitutional.[6] In Rhode Island the law has been declared constitutional, as it relates to corporations only. The Supreme Court of Massachusetts stands thus far alone in declaring it constitutional as to natural persons,[7] the Colorado court having recently refused upon a technicality to render an opinion on the subject,[8] though it is clear from its opinion on the eight-hour law (see § 11), that its opinion, if rendered, would have been adverse.

And the times of such periodical payments are further defined in several states; thus, not later than Friday of each week in Kansas, or eight days after the week's expiration in New Hampshire and Connecticut, or six days thereafter in New York, Illinois, and Massachusetts. So in others the full amount due up to within fifteen days must be paid;[9] and in Alleghany County, Maryland, if the wages of miners or

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[5] Ind. R. S., 7071. So, in New York, the company is forbidden to require them.

[6] Arkansas, Texas, Illinois, and probably it would be so held in Missouri, West Virginia, and others; see below, and in § 23.

[7] See below in the text.

[8] Re House Bill 107, 39 Pac., 431.

[9] Mo., Pa., or ten days (O.), or twenty days (W. Va., *ib.*, § 5), or nine days (R. I.).

manufacturing employees remain unpaid thirty days the court may appoint a receiver of the delinquent employer.[10]

Employers failing to comply with these laws are commonly made liable to a fine[11] or to increased damages to the employee.[12]

Thus, any corporation or person failing for ten days after demand to pay employees for labor, is liable to a penalty of one dollar for each succeeding day, and an attorney's fee;[13] so due bills must be issued for labor due up to the date of demand of payment, whenever such demand is made, which due bills must be negotiable and redeemable in cash;[14] and thirty days' notice of a reduction in rate of wages is required from all corporations.

Weekly payments by large employers of labor are certainly to the advantage of the laborer. They tend to prevent both waste and the attachment of wages by creditors. Nevertheless, the disadvantage of permanently forbidding by law contracts ordinarily free was curiously shown in the late panic, when many companies or firms desirous of going on provided they could make

[10] Md. Loc. L., Alleghany Co., § 189.

[11] Ind. R. S., 7069.

[12] Mo., 2539; Ind. R. S., 7057, 7068; but see note 6, and compare § 23.

[13] Ind., *ib.*

[14] Mo., 7059.

an extension of time of payment with their employees, were prevented from so doing under such statutes, although the employees were more than willing to accept half their wages in cash and wait for the balance rather than have the factory closed. As to private individuals, however, weekly payment statutes have been declared unconstitutional in every court where they have been discussed, with the exception only of that of Massachusetts.[15] In Rhode Island alone has the law been sustained as to corporations, while in Missouri and Texas, where it applied solely to certain classes of corporations, it was declared void as class legislation.

Thus, in Texas, where the first case arose,[16] the statute provided that in the event of the railway company refusing to pay wages to an employee within fifteen days of demand, it should be liable to pay twenty per cent. on the amount due him as damages in addition thereto. The court held that while railways occupied a two-fold character, public and private, and might be regulated as a highway, they could not be specially regulated as a corporation in all their internal economy, and that although the doctrine is often stated that a statute is not subject to the objection of being class legislation when it

[15] Opinions of Justices, 163 Mass., 589.

[16] San Antonio & A. P. Ry. Co. *v.* Wilson, 19 S. W., 910.

affects equally all who are brought within the relations and circumstances provided for, it by no means follows that the legislature has the right to impose any burden while simply placing it on all the individuals of a certain class. "It must rest upon some reason upon which it could be defended. . . . No well-considered case can be found sustaining a penalty on an ordinary contract where public interest was not involved. . . . An exception that undertakes to single out a single class and attach a penalty to a failure to pay one class of their creditors is not 'the law of the land' and cannot be sustained."

There is no special provision in the Texas constitution against class legislation, and the court apparently based its decision on the Fourteenth Amendment to the United States constitution, siding with the minority opinion in the Slaughter House cases,[17] or upon the general principle that such legislation would be invalid without an express constitutional prohibition.

The next case was the case of an ordinary weekly payment law, but applying only to the employees of corporations, and occurred in Rhode Island.[18] Here the court denied that the Fourteenth Amendment applies to such a case, on the ground that the law was but a valid exercise

[17] 16 Wall, 36.

[18] State *v.* Brown & Sharpe Mfg. Co., 25 Atlantic Rep., 246. *Quære* as to the law of this case.

of the power reserved to the legislature to amend or repeal acts of incorporation, and that a corporation was not a citizen of the United States within the meaning of the Fourteenth Amendment; and noted that the act still permitted employees of such corporations to be paid by the job or by the piece.

To the same effect, as to corporations, was the Arkansas case arising in 1894,[19] but it held that an act of Arkansas requiring corporations and persons operating or constructing railroads, to pay their employees on the day of discharge the unpaid wages then earned by them at the contract rate, without abatement or reduction, was only valid in so far as it applied to corporations. The court differed from the Texas court, on the ground of class legislation, denying that it fell within the prohibition of special legislation, for the reason that it was general and uniform in its operations on all persons coming within the class to which it applied; but affirmed the right to contract of individuals, disapproved Hancock *v.* Yaden,[20] and declared that part of the act unconstitutional which applied to private individuals. Mr. Justice Bunn, however, filed a dissenting opinion to the effect that the whole statute was unconstitutional.

But the case of Braceville Coal Co. *v.* People,

[19] Leep *v.* Ry. Co., 25 S. W., 75.

[20] 121 Ind., 366 (see § 23).

decided by the Supreme Court of Illinois in 1893,[21] declared directly that, even a law providing that certain classes of corporations (which classes included all corporations for profit) should pay weekly each and every employee engaged in its business, the wages earned by such employee to within six days of the date of such employment, and forbidding contracts for other times of payment, was unconstitutional under the provision of the constitution of Illinois, Section 2, Article 2, identical with that of the Federal Fourteenth Amendment, that "no person can be deprived of life, liberty, or property except by due process of law;" and that it was also contrary to that provision of the Illinois constitution which forbids corporate charters from being amended by special laws, since it attempts to amend the charters of the kinds of corporations named in the act, while not affecting others created under the same general laws. As there is no such constitutional limitation in Rhode Island, the reason of this branch of the case does not impair the Rhode Island decision; but on the former point the case appears conclusive, at least under such states as have the constitutional provision against depriving persons of property without due process of law,[22] and perhaps in the

[21] 35 N. E., 62.

[22] See § 2.

others under the Federal Fourteenth Amendment. The court say that "the words 'due process of law' are to be held synonymous with 'the law of the land,' and this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals. There can be no liberty, protected by government, that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. . . . Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. And

the right of property preserved by the constitution is the right, not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. . . . It is undoubtedly true that the people in their representative capacity may, by general law, render that unlawful, in many cases, which had hitherto been lawful. But laws depriving particular persons, or classes of persons, of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction, or reason, not applicable to others, not included within its provisions. . . .

" The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employee as well. . . . An illustration of the manner in which it affects the employee, out of many that might be given, may be found in the conditions arising from the late unsettled financial affairs of the country.

It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of the employers, as well as in the public interest, that employees consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be open, and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this state, and under this law, no such contract could be made. The employee who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employee, and the employer subject to a penalty for making it. The employee would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would,

by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor as others might do denied them."

The substance of this case appears to be, therefore, that the act was void because it interfered with the freedom of contract, both of employer and employee, impliedly guaranteed by the Illinois constitution under the clause identical with the Fourteenth Amendment; and that it could not be upheld on the ground that it amended the charter of corporations, for the reason that the Illinois constitution also required that such charter should not be amended by special laws, and that this was such a special law, which did not carry with it its reason on its face. We are, therefore, met with a dilemma. If a general weekly payment law is proposed, applying to all persons and corporations, it is an interference with general liberty of contract, and can hardly be sustained under the police power, because to prohibit everybody from paying wages or salaries monthly or quarterly can hardly be said to be reasonable on its face; and on the other hand, if it apply to special classes, or even special corporations, it may be held unconstitutional as class legislation. Such laws are probably valid only as to corporations, in states which have a provision that their charters

may be amended, *except* in those states which, like Illinois, provide that it shall only be done by general law. In those states, weekly payment laws to be valid would have to apply generally to all corporations ; and as to individuals, or private employers, such laws would to-day be probably held unconstitutional in all states with the exception of Massachusetts. They therefore fall naturally within those reforms which should be attempted only through the trades-unions or otherwise by voluntary contract.

§ 22. **Notice of Discharge.**—By the usual custom, when an employee, or laborer, or servant is discharged without cause, and in some cases, where the employee, etc., leaves without cause, the employer in the one case, the employee in the other, is entitled at most to a notice equal to the term of payment of wages ; and inferentially the statutes referred to in the last section prescribing such terms would prescribe a like notice. In the absence of such custom, no notice is necessary on either side.

But this usual law is being rapidly modified by statutes in the interest of the employee ; and even express contracts requiring notice on either side or both are being forbidden or regulated. The usual form of such statutes is that " where a contract provides, under penalty of forfeiture

of wages or of some deposit or money fine by the employee that he shall give a notice of intention to leave the employer, the employer shall be liable to payment of a like forfeiture if he discharge without similar notice an employee *except for incapacity or misconduct, unless in case of a general suspension of labor in his shop or factory*;[1] and by an act of Massachusetts, passed this year, the italicised exception has been stricken out of the law.[2] So in Louisiana, there is a statute prohibiting steamboat employees under a penalty from leaving without notice; and in Connecticut it is made a penal offence to withhold wages because of any contract express or implied to give such notice.[3] The constitutionality of such laws is perhaps doubtful. So, in Texas, the law is probably unconstitutional which declares that "All persons in the employment of any railway company shall be entitled to receive thirty days' notice from said company before their wages can be reduced by said company;"[4] while the Maine statute, that "Any person or corporation may contract with employees to give one week's notice of intention on such employees'

[1] Mass., 1894, 508, 1; R. I., 1886, 571; N. J. Sup., p. 772, § 14, 1895, 142; Pa., 1887, 122.

[2] Mass., 1895, 129.

[3] La. R. L., 945; Ct., 1748. See § 62.

[4] San Antonio Ry. Co. *v.* Wilson, 19 S. W., 913. See Texas Laws, 1887, 30.

part to quit employment, under penalty of forfeiture of one week's wages; but in such case the employer shall be required to give a like notice, or shall pay such employee discharged a sum equal to one week's wages, except when the discharge or leaving of the employee is for a reasonable cause" (Me., 1887, 139, 4), if there be such a constitutional principle as liberty of contract, certainly infringes it; unless the contract can be considered such a fraud upon the employee as to come under the police power (§ 4).

There is no doubt, in the absence of such statute, of the legality of contracts providing against sudden abandonment of work without notice; and such contracts express or implied have been universally sustained, both as to a fixed penalty[5] and the withholding of any or all wages.[6] Laborers desire the law altered so as to facilitate sudden strikes; but the true path of improvement, as well as the tendency of the statutes, would seem rather to be the other way. Just as indeterminate relation is the essence of slavery, so a definite contract is the relation of freedom; and if employees are to go on raising their position, it must be done through contract, by bargaining on both sides. Such bargaining may be

[5] Walls *v.* Coleman, 34 N. Y. State, 281.

[6] Preston *v.* Am. Linen Co., 119 Mass., 400; Harmon *v.* Salmon Falls Co., 35 Me., 447.

collective; that is, it may be enforced by the mass of employees, or by trades-unions, in the interest of any one employee; but to make such bargaining effectual, both sides must be responsible. The necessity of preventing an arbitrary and sudden cessation of the employment contract on the part of the employee has already impressed the public mind, and statutes are being passed, at least in the case of railroads and other employments necessary to the public safety and convenience, which prohibit employees from leaving without notice at inopportune times. Such statutes will be found later collected under § 62, and the matter will be further discussed in the case of strikes. But the withholding of wages for a reasonable time as a guaranty for the employee's compliance with a contract requiring reasonable notice, such as one week, seems to be the actual and proper method by which the employer can protect himself, and the public as well, against the injury caused by sudden breach or rescission of the contract on the part of all his employees simultaneously.

§ 23. **Money of Wage-Payments.**—The English anti-truck act, passed in 1831, has been copied in many of our states in laws providing generally that laborers may be paid only in money, not in goods or orders, even orders for the payment of money. But in every state, save

Indiana, where the law has been questioned, the courts have held it unconstitutional. Thus, in many states the law is that all employers of labor may pay only in lawful money, and not in goods or orders upon company stores, or any other stores, nor may (except in New Mexico) he set-off money so due for goods against money due for wages, even by voluntary contract of the laborer.[1] In others the statute is the same, but it applies only to corporation employers.[2] In some the law applies only to certain industries, such as mining;[3] in Kansas it does not apply to farmers' help; and in Maryland its operation is made local to certain counties. In Kansas and Ohio the employer may give orders on stores "in which he is not interested," but in Kansas only "at the solicitation of the employee." The employer offending is usually made guilty of a misdemeanor,[4] or liable to the employee in dam-

[1] N. J. Sup., p. 771, § 7; Pa., 1891, 96; Ind., 7059, 7066; O. R. S., 7015; Ill., 1891, p. 212, and W. Va., 1887, 31, 3 (law annulled as unconstitutional); Wash., 2531; S. C., 2086; N. M., 1893, 26.

[2] N. Y., 1895, 791, 2; O., 1890, p. 78 (annulled as unconstitutional); Md. Local Laws, 1880, 273; Ky. Const., 244 (as to *general* labor).

[3] Thus, to mining employees only (Io., 1888, 55; Ind., Ky. Const., 244; 1892, 35), or manufacturing companies (Ind., Ky.), or to various specified industries (N. J.).

[4] Pa., Ind. R. S., 7063; O., 7015; Kan., 2441; Md., Va., Wash., 2532.

ages, or for a penalty;[5] and contracts to the contrary are forbidden.[6]

And in other states the money payment must either be cash or orders in lawful money, payable at a limited period,[7] or at sight[8] (and compare also § 22). But in several the statute expressly provides that checks, notes, or orders for money may be given, payable at any time, though in Ohio and South Carolina they must be checks on a bank.[9] Bank bills may, however, be used, though not legal tender, with the employee's consent.[10]

In Louisiana there is a new law, prohibiting the issue of checks or tickets redeemable in goods alone by any person, firm, or corporation; and such checks, etc., must be redeemed in money.[11] And a new statute in Missouri makes it a misdemeanor for any person or corporation to pay wages in orders, etc., not redeemable in money at their face value, and not to redeem the same at any time during business hours when

[5] Ind. R. S., 7062; Wash., 2533.

[6] Md. Loc. L., Alleghany Co., § 185; Ind. R. S., 7071.

[7] N. J. Sup., p. 771, § 4; Ind., 7066; Va., 1887, 391; W. Va. Code, p. 1003, § 3; Tenn., 1887, 209. It must be at a fixed time, and with *eight* per cent. interest. Ind., 7060.

[8] N. J., *ib.*; Kan. G. S., 2441; O., 7015; Wash.

[9] Ind., *ib.*; S. C., 2086; O., 1890, p. 78 (annulled as unconstitutional).

[10] Md. Local Laws, 1880, 273; Alleghany County, § 187.

[11] La., 1894, 71.

presented,[12] the class legislation principle being thus avoided, as the old law was declared unconstitutional on that ground (see below).[13]

Although in five states this statute has been annulled as unconstitutional (see below) and the decisions of other states in the case of weekly payment laws[13] would seem to make it likely that the courts of those states would also hold this law unconstitutional, it may fairly be questioned whether such laws, the reasonableness, even the necessity, of which have been proved by more than a generation of actual trial in England, do not fairly fall within the province of the police regulation of government. The case seems much stronger than that of weekly payments, discussed in § 21; for by process of compelling the employees to trade at companies' stores and accept their pay in credits, and giving them credit at such stores in advance, it is easy to see that they may be kept under the power or the con-

[12] Mo., 1895, p. 206.

[13] See § 21. So in North Carolina no person or corporation may issue in payment for labor orders or tickets not transferable, or in any form that would render them void by transfer from the person to whom issued, but all such tickets, etc., shall be paid to the person holding the same their face value, provided that this act only applies in certain counties. N. C., 1889, 280.

In Wisconsin lumber and building corporations must give employees written evidence of indebtedness when the payment of their wages is deferred. Wis., 1891, 430.

trol of the employer, unless, indeed, they are willing to leave both the occupation and the neighborhood entirely, which in most cases they cannot do; for these laws apply specially to laborers who are generally ignorant, notably miners, who are frequently newly arrived Hungarians and Poles, without education, and employed necessarily in places remote from towns, where there may be no other source of supply than company stores, and no other easy market for their labor. The reason of such legislation as to such classes would seem to be justified on its face. (Compare §§ 4, 11.)

Nevertheless, wherever these statutes have been questioned, the courts have, except in Indiana, held them unconstitutional; these states being Pennsylvania, Ohio, West Virginia, Missouri, and Illinois. The Pennsylvania act[14] provided that all persons and companies engaged in mining of any kind, or manufacturing, should pay their employees weekly in cash, and not in goods or otherwise. The court simply said that the first four sections of the act were utterly unconstitutional and void, "inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The

[14] Pa. Laws, 1881, June 29, Dig., Ed. 1885, p. 1010.

act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." [15]

In the next cases, arising in West Virginia, the statute prohibited persons engaged in mining or manufacturing from issuing orders in payment of labor, except such as could be payable in money, and from selling to their employees at a greater percentage of profit than to others, and made violations of such provisions a misdemeanor. The court here seems to put the objection more particularly on the ground of class legislation, but said: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the constitution." [16]

The Illinois statute provided that it should be

[15] Godcharles *v.* Wigeman, 113 Pa., p. 437.

[16] State *v.* Goodwill, State *v.* Fire Creek Coal Co., 33 W. Va., 179, 188; 10 S. E., 285.

unlawful for any person or corporation engaged in mining or manufacturing to keep a truck store, or be interested therein, and was held unconstitutional for the same reasons as in West Virginia, and the court [17] expressly dissented from Hancock *v.* Yaden,[18] which case sustained the statute of Indiana requiring miners to be paid in lawful money, and not in goods and merchandise, and forbidding the making of contracts to be so paid otherwise than in lawful money. This case, however, was put largely on the ground that the standard money of the government must be maintained, and that such contracts would open the door to the legality of contracts for payment in something else than lawful money, such as gold coin. This reason is certainly fallacious, and the whole case may be considered of doubtful authority. And the weight of authorities is further sustained in the case of State *v.* Loomis,[19] decided in the Supreme Court of Missouri in 1893, upon the statute, R. S., § 7058, expressly affirming Frorer *v.* The People, and differing from Hancock *v.* Yaden; and also, in 1894, by a case in Ohio. The Missouri statute, like the Illinois statute, referred to corporations engaged in manufacturing and mining, and for-

[17] Frorer *v.* People, 31 N. E., 395.
[18] 121 Ind., 366.
[19] 22 S. W., 350.

bade them to issue any order in payment of wages payable otherwise than in lawful money, or redeemable in goods except at the option of the holder at the company's store; the court refusing to recognize any special state of oppression peculiar to mining and manufacturing labor. But Barclay, J., filed a dissenting opinion, referring particularly to the English precedents, and basing the statute expressly on the ordinary police power of the legislature to interfere on behalf of a weak or ignorant class when the contracts in common use led to fraud. The Ohio case apparently concerned only the law of 1890, p. 78; but its reasoning would apparently render R. S., § 7015, unconstitutional as well.[20]

We must therefore conclude that, except, perhaps, in Massachusetts, these anti-truck laws are likely to be held unconstitutional. Such statutes may, however, be valid when they are limited only to corporation employers. (See discussion of this distinction in § 21.) The legislature of Pennsylvania, since the decision in Godcharles *v.* Wigeman, has passed a new law which applies generally to all persons or corporations, and has not yet been passed on by the courts. (See above, p. 102, note 1.)

[20] Case not yet reported. See Wheeling Bridge Ry. Co. *v.* Gilmore, 8 O. C. C., 669.

§ 24. **Company Stores, etc.**—In line with the statutes referred to in the last section, the running by companies or individual employers of general supply stores is in some states forbidden. Thus, in some, "it is unlawful for any manufacturer, firm or corporation, who own or control a store for the sale of general store goods or merchandise in connection with their manufacturing or other business, to attempt to control their employees or laborers in the purchase of store goods in supplies at such stores by withholding the payment of wages longer than the usual time."[1] In other states the company may have such stores, but it is made a penal offence to compel or coerce an employee to deal with them or with *any* particular person or corporation.[2] In other states the prohibition is only against selling to employees at a higher profit than to others, or than to cash customers, or at higher prices than the market value;[3] and such debts are made not collectible, or (as in Ohio) the employee may recover back double such excess in

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[1] N. J. Sup., p. 772, § 12; Tenn., 1887, 155. In Maryland the statute applies to railways and mines only: Md., 23, 202; in Pennsylvania only to mining and manufacturing corporations: Pa. Dig., p. 1385.

[2] O., 7016; Ind. R. S., 7072, 7073, 7074; Io., 1888, 55, 2; Kan. G. S., 2442; Mo., 7060; Wash., 1888, 128, 2.

[3] O., 7016; Va., 1887, 391, 4; W. Va. Code, p. 1003, § 4 (annulled as unconstitutional, see § 23); Ind. R. S., 7061, 7067.

price.[4] But in Illinois and West Virginia the several cases discussed in § 23 held this statute, forbidding certain corporations to maintain company stores, as invalid as the other, which forbade the payment of wages in goods. Probably, therefore, such statutes are unconstitutional everywhere except perhaps in some states where they apply generally to all classes of corporations, and not to individuals. See cases cited in § 23.

§ 25. **Payment of Piece Work; Screen Laws, etc.**—Several of the states have passed statutes providing generally for the fair weighing, etc., of coal at mines,[1] or that the coal must be weighed and credited to miners in determining the amount of wages due them before it is screened.[2] The latter statute, however, has been in Illinois declared unconstitutional, and the one in West Virginia will probably be so held under the decision in State *v.* Goodwill; [3] while the Colorado Supreme Court has recently rendered the

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[4] O., *ib.*

[1] Pa. Dig., pp. 1341, 1342; Ind., 1891, 49; W. Va., 1891, 82; Io., 1888, 53; Ky., 1885, 6, 1251; Tenn., 1887, 206; Ala., 1895, 140; Mo., 7055.

[2] Ind., *ib.* 5; Ill., 1887, p. 235; 1891, p. 170; Io., 1888, 54; W. Va., 1891, 82; Mo., 7054; Wash., 1891, 161; N. M., 1889, 126.

[3] 33 W. Va., 179, discussed in § 23.

legislature an opinion to the same effect.[4] There have been two Illinois decisions to this effect. The first in Millett *v.* The People,[5] applying to a statute passed in 1883 and amended in 1885, declared void as unconstitutional such part of the then statute as prohibited all contracts for the mining of coal in which the weighing of the coal as provided for in the act should be dispensed with; and also that the legislature had not the power to require the owners of coal mines to furnish scales and employ a person to use them and keep books of entry and weights for the benefit or information of the public without first making compensation to the owners, that being tantamount to an appropriation to public use of private property. The court held that these sections could not be maintained under the police power, as they had no tendency to insure the personal safety of a minor or to protect his property or the property of others, and that the legislature could not compel the owners of coal mines in particular to make contracts for labor for wages to be determined by weight of output, and not otherwise.

And in the case of Ramsey *v.* The People,[6] the act of 1891 was in question which pro-

[4] *Re* House Bill, 39 Pac., 431.
[5] 117 Ill., 294.
[6] 142 Ill., 380.

vided that where the owner of coal mines did contract for labor to be paid upon the basis of the quantity of coal mined, such coal must be weighed before being screened. The contracts of the plaintiff made with his miners were to pay them for each ton of screened coal, and it was held that such contracts were legal, and the statute forbidding them unconstitutional on the ground that those engaged in coal mining could not be singled out and subjected to restriction of their power to contract as to wages, while those engaged in all other classes of business are left free to contract as they see fit.

The same remarks apply to these statutes as to the anti-truck acts discussed in § 23. If it be true that coal miners are as a class in danger of being fraudulently imposed upon by their employers as to the amount due them for wages when paid by the ton, owing to the peculiar nature of the business, it would seem that their contracts for wages might reasonably be regulated under the police power in order to prevent a general fraud; but as the decisions now stand, such statutes are unconstitutional.

§ 26. **Labor upon Shares, Croppers, Etc.**— In one or two southern states there are special provisions as to agricultural labor in the case of farming upon shares and like contracts, by which a contract between the land owner and

the laborer, duly put in writing and witnessed and executed before a trial justice, whose duty it shall be to read and explain the same to the parties, may not be broken by either party under penalty of misdemeanor.[1] This statute is notable as making the breach of an ordinary contract a criminal offence, and if such statutes were enacted generally, they would very materially change the law of strikes and boycotts. (Compare sections 7, 8, 49, 55, 57.)

§ 27. **The Exaction of Bonds from Employees.** —In New Mexico, "No corporation, company, firm, or individual, shall demand as a condition precedent to giving employment to any person or retaining such person in employment, that such employee shall procure the bond or guarantee of any foreign guarantee company as an indemnity to such employer against loss by the act of such employee, unless such guarantee company shall have a designated agent at the county seat of some county in this territory." (N. M., 1888–89, 30, 1.)

The example of such legislation has not been followed in other states, though by the usual laws no foreign insurance or guarantee company can be admitted to do business in any state until it has complied with certain restrictions.

[1] S. C., 2081-2084.

§ 28. **Charitable Funds, Relief Societies, Etc.** —The institution by large railroad corporations of charitable or relief funds has been usual in England, and it has met with general approval in this country. Many such funds have been established, and some of them, as in the case of the Pennsylvania and the Chicago, Burlington and Quincy Railroads, now amount to sums ranging in the millions of dollars. They have generally effected an economic saving and have been supposed to be beneficial to the employee as insuring him against accident or physical incapacity, and to the employing company as protecting it against groundless suits, and especially to both as tending to more cordial and permanent relations between the company and its employees. Membership in such societies, or participation in such funds, undoubtedly tends to prevent strikes, to discourage the employees from forfeiting their rights by misconduct or by unreasonably leaving their employment. It has been common in the constitution of such relief societies to require that the members should enter into contract not to sue the company in the courts for injuries occurring in the course of their employment. But such contracts have lately been held illegal,[1] even although the in-

[1] Miller *vs.* C. B. & Q. R. R., 65 F. R., 305; C. B. & Q. R. R., *v.* Wymore, 58 N. W., 1120. *Contra*, Leas *vs.* Penna. Co., 37 N. E., 423.

jured employee has first had recourse to the relief fund and been paid out of it his full claim according to its rules, and in several states recent statutes have been passed forbidding employers to require of any person seeking employment as a condition or preliminary thereto, that he should enter into any contract whereby they shall agree to contribute to any fund for charitable, social, or financial purposes ;[2] or forbidding corporations to keep back wages on pretence of relief or assistance to employees [3] or to pay for wares, tools, etc.; or for the benefit of or as a contribution to relief associations, etc.;[4] or for the maintenance by railroads of any hospital, reading-room, library, gymnasium or restaurant.[5] Compulsory insurance in any particular company is forbidden in Michigan by a new law (1895, 209), but voluntary agreements for benefit funds are allowed, and the employer may deduct sums due for such from the employee's wages.

But on the other hand, in Massachusetts, and possibly other states, there are recent statutes expressly permitting the establishment of relief

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[2] N. J., 1891, 212; Mich., 1893, 192.

[3] N. J., *ib.*

[4] Md., 1890, 443. (The Maryland statute applies to railroad corporations only.) Mich., *ib.* 2.

[5] Ind., 2300. (But wages may be kept back for such a purpose under a written contract.)

societies for employees of railroads,[6] street railway companies,[7] and steamboat companies.

§ 29. **Company Physicians.** — In Tennessee there is a statute making it unlawful for manufacturers, firms, or companies to dictate to or in any manner interfere with any employee or laborer in his right to select his own physician, or to retain or withhold any portion of the wages due for paying a "company doctor," etc. (Tenn., 1889, 259.)

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[6] Mass., 244, 1; 1886, 195.
[7] Mass., 1890, 191.

CHAPTER III

POLITICAL PROTECTION AND LEGAL PRIVILEGES OF LABORERS

§ 30. **General Political Rights.**—By the Constitution laborers in all states must have the same political rights and liberties as any other class of citizens; and no express statutes are needed to secure this. A few statutes upon the subject have, however, been passed. Thus, in Minnesota and Wyoming, where "Employers are forbidden to require as a condition of employment the surrender of any right of citizenship or to discharge candidates because of their nomination for an election, or to interfere in the matter of such nomination."[1]

§ 31. **Voting.**—And in nearly all the states it is made penal or criminal for any person, by threatening to discharge an employee or to reduce his wages, or by promising to give him higher wages, or otherwise, to attempt to influence a voter to give or withhold his vote;[1] but

[1] Wy., 1893, 9; Minn., 1893, 25.

[1] Mass., 1894, 508, 5; Ct., 276; N. J., 1890, 231, 71; Pa. Dig., p. 480, § 52; Del., 1881, 329; O., 7065; Ind., 2341;

in Tennessee this statute applies to corporation employers only. And in New York and Montana political "pay envelopes" or placards are forbidden to be used by employers.[2] In a few states a period of two hours, or reasonable time to vote, is required to be given employees of manufacturing, mechanical, or mercantile estab-

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Mich., 9382; Wis., 4548a; W. Va., 5, 7; N. C., 2715; Tenn., 1887, 208; Mon. P. C., 108; Wy., 1890, 80, 174; S. C., 2552; La. R. L., 902; U. S., R. S., 5507; N. M., 1889, 135, 4. But in some states this statute applies only to corporations: Tenn., W. Va.

[2] "It shall not be lawful for any employer, in paying his employees the salary or wages due them, to enclose their pay in 'pay envelopes' upon which there is written or printed any political mottoes, devices, or arguments containing threats, express or implied, intended or calculated to influence the political opinions or actions of such employees. Nor shall it be lawful for any employer, within ninety days of general election, to put up or otherwise exhibit in his factory, workshop, or other establishment or place where his employees may be working, any hand-bill or placard containing any threat, notice, or information that in case any particular ticket or candidate shall be elected, work in his place or establishment will cease, in whole or in part, or his establishment be closed up, or the wages of his workmen be reduced, or other threats expressed or implied, intended or calculated to influence the political opinions or actions of his employees. This section shall apply to corporations, as well as individuals, and any person or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and any corporation violating this section shall forfeit its charter." (N. Y. P. C., 41, c (1890, 94); Mon. P. C., 109.)

lishments upon election days;[3] and in Tennessee absence for voting is declared no violation of a contract for personal service; "and every contract which will, or is designed to, keep such voters away from the polls shall be void."[4] In many states election day is made a legal holiday;[5] so, in New Jersey, eight hours is made a full day's work upon election days.[6]

§ 32. **Alien Labor and Contracts.**—By the constitution of California, "No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian . . ." (Cal. Const., 19, 2). This section, and sections 178 and 179 of the Penal Code, which were enacted to give it effect, were adjudged by the Circuit Court of the United States to be in conflict with the treaty of the United States with China, and to be therefore void (see "*in re Tiburcio Parrot*, 1 F. R., 481"); and this deci-

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[3] Mass., 1894, 508, 4; N. Y., 1892, 680, 113; O., 1890, p. 280; Ind., 2341.

[4] Tenn., 1039.

[5] N. Y., Pa., Wis., Md., Mo., Tex., Cal., Ore., Dak., Ida., Mon., S. C., Fla., Ariz. But *quære* as to whether these statutes apply to industrial labor. See Stimson's Am. Stat. Law, §§ 4134, 4727.

[6] N. J., p. 368, § 177.

sion would probably also annul similar laws in Nevada (Nev., 4764–4766, 4948–4949. See Note 6).

This is the only attempt that has been made to prohibit by statute the employment of aliens in private employments. But in several states it is forbidden to employ Chinese[1] or aliens[2] upon state, municipal, or public works (in California, Wyoming, Idaho, by the Constitution), and such work can be given only to United States citizens;[3] or in New York, as to stone-cutting work, only to citizens of that state,[4] while in all cases "preference" is to be given to such citizens. And in New York it was made a criminal offence for a contractor on public work to employ an alien; but this statute has been declared unconstitutional, besides being in violation of our treaty with Italy.[5]

There are further specific provisions in California and Nevada restricting the immigration and labor rights of Chinese and Mongolians, but

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[1] Cal. Const., 19, 3; Nev., 4947; Ida., 1891, p. 233. Except, in California and Idaho, as a punishment for crime.

[2] N. Y., 1874, 622; Ill., 1889, p. 2; Ida. Const., 13, 5; Wy. Const., 19, 1.

[3] N. Y., Ill., Ida.

[4] N. Y., 1894, 277; 1889, 380, 2.

[5] N. Y., 1870, 385, § 2; 1894, 622; People *v.* Warren, 34 N. Y. Sup., 942.

they are probably inconsistent with federal law and treaties.[6]

[6] "The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this state, and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the legislature may prescribe. The legislature shall delegate all necessary power to the incorporated cities and towns of this state for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits, and it shall also provide the necessary legislation to prohibit the introduction into this state of Chinese after the adoption of this constitution. This section shall be enforced by appropriate legislation." Cal. Const., Art. 19, § 4.

"No supplies of any kind or character, 'for the benefit of the state, or to be paid for by any moneys appropriated or to be appropriated by the state,' manufactured or grown in this state, which are in whole or in part the product of Mongolian labor, shall be purchased by the officials for the state having the control of any public institution under the control of the state, or of any county, city and county, city, or town thereof." Cal. Pol. Code, § 3235.

"Preamble.—*Whereas*, all Chinese who come to this coast arrive here under a contract to labor for a term of years, and are bound by such contract, not only by the superstitions of their peculiar religions, but by leaving their blood relations, fathers, mothers, sisters, brothers, or cousins, as hostages in China for the fulfilment of their part of the contract; and, whereas, such slave labor and involuntary servitude is opposed to the genius of our institutions, opposed to the prevailing spirit of the age, as well as to humanity and

Alien Contract Laws.—In Indiana, it is made unlawful for any person or corporation to transport, or assist, or pay for the transportation of aliens into the state under contract, express or

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Christianity, and degrades the dignity of labor, which is the foundation of republican institutions; and, whereas, section 17 of Article 1 of the constitution of the state of Nevada reads as follows: Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state;" therefore,

The people of the state of Nevada . . . . do enact as follows:

The immigration to this state of all slaves and other people bound by contract to involuntary servitude for a term of years, is hereby prohibited.

It shall be unlawful for any company, person, or persons, to collect the wages or compensation for the labor of the persons described in the first section of this act.

It shall be unlawful for any corporation, company, person, or persons, to pay to any owner, or agent of the owner of any such persons mentioned in section 1 of this act, any wages or compensation for the labor of such slaves, or persons so bound by said contract to involuntary servitude.

Any violation of any of the provisions of this act shall be deemed a misdemeanor." Nev., 4764–4767.

"Hereafter no right of way or charter, or other privileges for the construction of any public works by any railroad or other corporation or association shall be granted to such corporation or association, except upon the express condition that no Mongolian or Chinese shall be employed on or about the construction of such work in any capacity.

Any violation of the conditions of this act shall work a forfeiture of all rights, privileges, and franchise granted to such corporation or association. Nev., 4948–4949.

implied, to labor, and such contracts are void.[7] But compare the (U. S., 1885, ch. 164) federal law, which forbids such assistance and annuls such contracts *in toto*, and hence overrides this and similar statutes of the states regulating or allowing such contracts; as, in Wyoming, not exceeding six months, or, in Virginia, two years.[8]

§ 33. **Special Privileges of the G. A. R.**—There are in many states recent statutes specially giving preference of work to members of the G. A. R., or exempting them from the operation of civil service laws, or giving to them or the Sons of Veterans special educational or eleemosynary privileges. Thus, in many states discharged soldiers or sailors are to be *preferred* in all public works by or in behalf of the state or municipalities thereof,[1] but only provided they possess the other requisite qualifications; or, in Massachusetts, if they have passed the civil service examination. So, the widows and orphans of deceased soldiers and sailors may not be discharged.[2]

The new constitution of New York provides for such a preference; and that all examinations

[7] Ind. R. S., 7079, 7080.

[8] Va. Code, 6, 44; Wy., 1075–1077.

[1] Pa., 1887, 132; Ct., 1889, 124; N. Y., 1887, 464; O., 1888, p. 149; R. S., 8209–16; Minn., 8041; Kan., 5927, 5928; Dak., 1887, 205; Mass., 895, 501. [2] Kan., 5928.

shall be competitive "so far as practicable;" and under it the act of 1895, chap. 344, providing that competitive examination shall not be deemed practicable or necessary in cases when the pay of the office does not exceed $4 per day, has been held constitutional in a lower court.[3]

§ 34. **Attachment of Wages.**—Laborers are generally protected by laws prohibiting the attachment, by garnishment or trustee process, of debts due them or their wives and children for wages or personal service. In some states such wage debts are exempt to any amount;[1] in others the amount exempt is limited to $50 or $100,[2] or to one month, or 60 days' wages.[3] And in a

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[3] Re Keymer, 12; Misc. (N. Y.), 615.

[1] Pa. Dig., p. 836, 49; Del., *v.* 15, 185; Tex. Const., 16, 28; Ala., 2512; Ga., 3554; Fla., 2008; Okla., 2846. But at a rate not exceeding $25 a month (Ala.), $100 (D. C.).

[2] Thus, $20: Mass., 183, 30; $25: Minn., 1889, 204; Mich., 8032, 8096; $30: Tenn., 2931; Col., 1889, p. 463; $50: Ct., 1231; Ill., 62, 14; Ky., 1894, 92; Va., 3652; Nev., 3267; $100: Md., 9, 32; Wy., 2831.

[3] Thirty days or one month's wages only are exempt: Io., 463; Ind., 971; Minn., Mo., 5220; Nev.; Ky.; Cal. C. P., 690 (7); Ore., C. P., 313; Col.; Ida., C. C. P., 4470; Ga.; Ariz., 4, 97. So 60 days' wages only; Neb. C. C. P., 531a; Ark., 3717; D. C. (U. S.), 1878, 321; Dak., C. C. P., 371; S. C., C. C. P., 317. 90 days: Io., 4299; Kan., 5012; N. M., 1887, 37, 1. One half the debtor's wages only are exempt for 30 (Col.) or 60 days (Uta.) preceding; Col., 1889,

few of these states an exception is made of claims for necessaries furnished the debtor or his family.[4]

In some states the exemption only exists when the debtor is a householder having a family,[5] or is head of a family,[6] or when the wages thus exempted are necessary for the support of his family.[7]

The wages of the debtor's wife and children, or family, are also exempt in like manner respectively in several states.[8]

No assignment of wages is valid against the employer unless he has actual notice thereof;[9] or it is recorded in the town clerk's office (or register of deeds) where the assignor resides.[10]

The constitutionality of such statutes appears never to have been raised; the right to attachment is not a common law but a statutory right; but the exempting of certain debts from attachment appears to savor somewhat of class legislation. It is probably justified as ordinary exemptions are justified (see § 35).

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p. 463; Uta., 3429. Twenty dollars are exempt unless the suit is for necessaries; in that case ten dollars; Mass., 183, 30.

[4] Mass., Ky., Cal., Ga.

[5] Va. [6] D. C., Fla., Ill., Col., Mo.

[7] Cal., Col., Utah., Ida., Ariz., S. C., Dak., Kan., Wy., Ore.

[8] Mass., 183, 29; Ct., Vt., 1075; Mich., 8096; Minn., Io., 4299; N. M.

[9] Me., 1891, 73. [10] Mass., 183, 37; R. I., 1884, 458.

In Wyoming there is a new statute (1895, 47) making it unlawful for any creditor or holder of any debt, book account, or claim against any laborer, servant, clerk, or employee of any corporation, firm, or individual in the state to sell, assign, or dispose of such claim, etc., to any person, firm, or corporation, or to institute elsewhere than in the state, or prosecute any suit for such claim against such laborer, etc., by any process seeking to attach the wages of such person earned within sixty days prior to the commencement of such proceedings for the purpose of avoiding the effect of the laws of Wyoming concerning exemptions, and it is made unlawful for any person to aid, assist, abet, or counsel a violation of this act. Proof of the institution of such suit or service of garnishment by any person, firm, or individual in any court of any state or territory other than in Wyoming, is declared *prima facie* evidence of such evasion of the law of Wyoming, and such persons may be made liable to the parties injured for the amount of the debt so sold or assigned and an attorney's fee. The constitutionality of this amazing statute may, perhaps, be questioned.

§ 35. **Ordinary Exemptions not Valid against Labor Debts.**—By the constitution of Virginia, and the statutes of a few other states, no property is exempt from attachment or execution

for wages due any clerk, mechanic, laborer, or servant,[1] or no stay is granted upon such claims.[2]

And the ordinary exemptions of personal property from execution are much restricted in the case of judgments obtained for labor or services other than professional.[3]

The constitutionality of such statutes will be discussed in § 36. The New York law, applying only to female creditors, is subject to special criticism; see § 13.

§ 36. **Preference or Priority of Wage Debts.**— And further, the state laws very generally give a claim either absolutely preferred, or preferred after taxes, state or government dues, and costs, to servants, laborers and employees, and in some cases clerks, for debts due for wages or salaries, above all other claims against the estate of an insolvent person,[1] or an insolvent corporation or

[1] Va. Const., 11, 1; Code, 3630; New York city, N. Y. 1882, 410, 1086 (as to females, only, up to $50); Mich., 7091; Mo., 4910; Kan., C. L., 1885, 2660; Neb. C. C. P., 531; Okla., 2848. But the amount of the claim is sometimes limited; as, in Michigan, $25, in New York, $50, in Missouri, $90. The ordinary exemption may be claimed against labor debts of a greater amount.

[2] Mich., 7091 a.

[3] Mich., 7717 a–7717f.

[1] N. H., 201, 32; Vt., 2148; R. I., 237, 14; 1885, 497; Ct., 514; Mass., 137, 1; 157, 104; N. Y. R. S., p. 2542; 1885, 376; 1886, 283; 1895, 899; Pa. Dig., p. 140, § 4; 1891, 46;

its receiver,[2] or the estate of a deceased insolvent.[3] Such preference is usually given to claims not exceeding a fixed amount,[4] or for wages due for not more than a limited time.[5] But in the case of a receivership, there appears to be no such limitation, in Indiana.[6]

And in some states a lien is given to all laborers for amounts due from a corporation up to the time of the act of insolvency upon all the assets of the company, which is paid prior to any other debt, and such lien is given to all workmen or employees, or claimants for labor or services whether in the actual employ of the cor-

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N. J., p. 38, 8; Ind., 7051; Mich. 8749 m; Ill., 72, 42; 1887, p. 308; Wis., 1693 c; Del., 1879, 147; Io., 1890, 48; Minn., 6256; Neb., 6, 44; Mo., 4911; Cal., 1204-5; Nev., 3829; Ore., 1893, p. 30; Col., 1885, p. 48, 25; Wash., 3122; Wy., 1893, 15; Mon. C. C. P., 2150; Utah, 1892, 30; La , 3191; Ariz., 1889, 10.

[2] N. Y., 711, 1887, p. 308; Mo., 2538; Io., Pa., Minn., 6254; Ore., Nev., Mon., Utah.

[3] Mass.; Minn., 6256; Cal.; Nev., 3830; Wash., 3123; Mon.; Ala., 2079; La.; Mo., 183.

[4] Such as $50 (Del., N. H., Vt., Ind., Col.); $100 (Ct., R. I., Mo., Mass., Pa., Neb., Ariz., Cal., Wash., Io.); $200 (Pa., 1891, 46; Minn., Nev., Mon., Ariz.); $300 (N. J.).

[5] In others the amount is not limited (N. Y., Utah, Mich., Wis., Wy., Ore.). For a time not exceeding one month (Del.); sixty days (Cal., Wash., Ariz., Mon.); three months (Wy., Nev., Wis., Io., Ct., Ill.); six months (N. H., Vt., Ind., Minn., Col., R. I., Mo., Ore., Uta.); nine months (Neb.); twelve months (Mass., Ala., La.).

[6] R. S., 7058.

poration at the time of the insolvency or not.[7] So, in New Jersey, whenever a receiver is appointed in a suit at law or equity, to take possession of property of any manufacturer, etc., and wages are due, the chancellor may order a sale of the property to pay the same without delay, or so much of it as may be necessary.[8]

And the statute is not unusual that claims for labor done on railroads, or liabilities to contractors for construction, laborers, etc., take precedence of any mortgage before or after created.[9] And, in Pennsylvania, and any assignment or conveyance of the real or personal estate of said company without the written assent of such creditors first obtained is declared fraudulent and void. And in New Jersey no attachment or execution may be made on the property of any manufacturer or other person unless all claims due for labor, not exceeding one month's wages, are first paid.[10]

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[7] N. J. Rev., p. 188, § 63; 1887, 71; Minn., 6254; Del., 1883, 147, 38.

[8] N. J. Sup., p. 770, § 1.

[9] Pa. Dig., p. 139, § 1; Ky. G. S., 70, 3, 1; and so of manufactories, etc., in Kentucky. In Garrett County, Maryland, if any individual engaged in mining or manufacturing, or any corporation whatever, is indebted for thirty days to employees, or to furnishers of raw material in the aggregate sum of twenty-five dollars, and neglects or refuses to pay the same, the circuit court may, upon petition of any such employee or material man appoint a receiver:—Md. Local Laws, 1888 (Garrett Co.), 145.

[10] N. J. Rev., p. 749, § 1.

The constitutionality of such statutes as the above has rarely been brought into question, but must probably rest either on the police power (§ 4) or on the precedent of the bankruptcy act. They do not "impair the obligation of contracts" (see § 2), because all contracts, including those of other creditors, may be considered as entered into with reference to these laws. They have been upheld in the case of mortgages of coal mines, where a statute gave laborers a superior claim, the mortgage being made after the statute;[11] and in the case of a statute giving preference to labor creditors over the ordinary creditors of a corporation.[12] Still it is difficult to see why they are not class legislation, however justifiable morally.

§ 37. **Stockholders Specially Liable for Wage Debts.**—Besides the ordinary provisions of law making stockholders personally liable for the debts of corporations in certain cases, Michigan has a constitutional provision, and several states have passed express statutes, making them in all cases individually liable for debts of the corporation due for labor or personal services.[1] In

[11] Warren *v.* Solen, 112 Ind., 213.

[12] Ripley *v.* Evans, 87 Mich., 217.

[1] Mass., 106, 61; N. Y., 1892, 688, 54; Pa., 1854, 4385, 1874, 10, 11; Mich. Const., 15, 7; Wis., 1769; N. C., 1940; Okla., 1074.

some states each stockholder is jointly and severally liable therefor to any extent,[2] in others only to an amount equal to the par value of his stock.[3] In most cases a demand must first be made,[4] or suit brought,[5] against the corporation. In some states the law applies only to railroads[6] or manufacturing corporations,[7] mining companies,[8] and other specified classes of corporations.[9]

Of the constitutionality of such statutes there can be no doubt, except perhaps in states where the constitution forbids the amendment of corporate charters by special law. Compare § 11.

In New York stockholders of any corporation are jointly and severally liable personally for debts due laborers, servants, or employees, after written notice by such employee given within thirty days after termination of such services, and action brought within thirty days after the return of an execution unsatisfied against a corporation. Executors and trustees are not so liable, unless they voluntarily invested themselves in the stock.[10]

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[2] Mass., N. Y., N. C., Okla. But not for an amount due for services rendered more than six months before: Mass., Pa. (in mfg. co's). So, for thirty days' wages, only (N. C.), or six months (Wis.).

[3] Pa. Dig., p. 423, 99 (of general corporations); Wis.

[4] Mass., N. Y.

[5] Pa., N. Y., N. C., Okla.

[6] N. C.

[7] Pa., Mass., Okla.

[8] Pa., Okla.

[9] Mass.

[10] N. Y., 1890, 564, 57; 1892, 688, 54.

§ 38. **Insurance and Beneficiary Funds Exempt to Laborers.** –There are frequent provisions in the various states providing that life insurance moneys shall go to the widow or children free of the claims of creditors.[1] And in some states there are similar provisions relating to beneficiary funds paid over by benefit societies, etc., not exceeding the sum of five thousand dollars, or a similar amount.[2]

§ 39. **Other Legal Privileges of Laborers, Etc.**— Suitors for money due for personal service have in several states special privileges in the courts. Thus in some states action for wages "shall be first in order for trial," [1] no security for costs is required,[2] additional costs may be recovered,[3] no court fees at all required,[4] no stay of execu-

[1] See, particularly, S. D., 1890, 86, 45; Fla., 2347, whereby any sum is so free if insured to the widow or children. In Mississippi $5,000 is free, though the policy be in the name of the executor, Miss., 1965, or $10,000 to the insured, Miss., 1966.

[2] Any amount is so declared free, Minn., 1885, 184, 17; $5,000, Minn., G. S., 34, 369; any amount up to $250 annual premium, Ida., 4480.

[1] O., 5134.

[2] Wis., 3783a; Mich., 7717e.

[3] As to female employees others than domestic servants: N. Y., 1882, 410, 1424 (in New York City); C. C. P., 3131 (in Brooklyn).

[4] In suits for less than $50 in New York City: N. Y., 1882, 410, 1416.

tion allowed,[5] or a special attorney's fee recovered.[6]

The constitutionality of such class legislation may in some states be open to question. It was denied in Michigan and Ohio as to extra attorney's fees,[7] but sustained in Michigan as to dispensing with security for costs in cases of claims for labor.[8]

And in Michigan, where there is a stringent law against trusts, there is a special exception that this anti-trust act shall not apply to contracts and combinations relating to the services of laborers or artisans who are formed into societies or organizations for the benefit and protection of their members.[9] See in section 54.

§ 40. **Prison Labor** has lately been forbidden or regulated in many of the states, in the interest of the labor class; while in others it is expressly authorized. In some it may be leased or hired out indefinitely, in others only within the prison walls, in others only in certain prescribed occupations.

Thus the New York constitution provides that

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[5] Mich., 7091a; Io., 3063.

[6] Mich., 7091a.

[7] Chair Co. *v.* Runnels, 77 Mich., 111; Hocking V. C. Co. *v.* Rosser, 41 N. E., 263.

[8] Jones *v.* Shiawassee Circuit Judge, 63 N. W., 976.

[9] Mich., 9354o.

the legislature shall provide for the occupation and employment of prisoners, but that on and after January 1, 1897, no prisoner shall be allowed to work at any trade or occupation wherein the product or profit of his work is farmed out, contracted, or sold to any person or corporation, although the legislature may provide that convicts may work for, and the products of their labor be disposed of to, the state, or any political division thereof, or for any public institution owned or managed by the state, or any political division thereof.[1]

The Michigan constitution, that no mechanical trades are to be taught to convicts except those of which the chief supply for home consumption is imported from outside the state.[2]

The Idaho constitution, that all labor of convicts confined in the state's prison shall be done within the prison grounds, except where the work is done on public works under the direct control of the State.[3]

The California and Washington constitutions, that "the labor of convicts shall not be let out by contract to any person, copartnership, company, or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state."[4]

[1] N. Y. Const., 3, 29.
[2] Mich. Const., 1, 38.
[3] Ida. Const., 13, 3.
[4] Cal. Const., 10, 6; Wash. Const., 2, 29.

The Montana constitution, to the same effect.[5]

By that of North Carolina,[6] "convict labor may be employed on public works or highways or other labor for public benefit, and may be farmed out as provided by law, but no convict shall be farmed out who has been sentenced for murder, manslaughter, rape, or arson."

Where the statutes are silent, prison labor is of course legal, and many states have laws requiring it;[7] and so, commonly, as to tramps, for a short sentence, or even for one night.[8]

But by statute of many states prison labor may not be leased or hired outside the state prison or penitentiary.[9] In others no contract may be made for prison labor at all.[10] While in many

[5] Mon. Const., 18, 2.

[6] N. C. Const., 11, 1.

[7] N. H., 182, 14; 283, 3; 285, 1; Mass., 1884, 255, 28; Me., 140, 2; Vt., 4349; Pa. Dig., p. 1076; Del., 133, 6; Md., 27, 315; O., 6801; Ind., 8218; Ill., 108, 19; Mich., 9697; Wis., 4938; Minn., 1889, 255, 2; Io., 6136; Kan., 6442; Neb., 519; Va., 4125; W. Va., 163, 26a; Ky., 85, 2, 13; N. C., 3431; Tenn., 6366; Mo., 7232; Ark., 5500; Cal. P. C., 1590; Ore., 3862; Nev., 1405; 1887, 91; Col., 937; Ida. C., 13. 3; Wy., 3377; S. C., 2710; Ga., 4310; Ala., 4563; Miss., 3201; La., 2855; Tex., 3560; Fla., 3057; N. M., 479; Ariz., 2424; Dak., Pol. C. App., 53, 9.

[8] Me., 1889, 288.

[9] Minn., *ib.*, 7, 8; Wis., 4938; Kan., 6440; Mo., 7238; Ariz., 2424; Ore., 3864; Ida., Dak., Pol. C. App., 53; La., Miss.; and so in other states of convicts for murder, rape, or arson; Tenn., 6367; N. C., S. C.

[10] Mass., 1887, 447; N. J. Sup., p. 969, 17, 18, 21; Del.;

contracts are expressly authorized,[11] or even leases outside the prison walls.[12] In others, prison labor outside the walls may be employed by the state, or by counties or towns,[13] or by railway, or other specified corporations,[14] or in specified occupations, such as work on the roads,[15] railroads,[16] coal mines,[17] or tramps at breaking stone only.[18]

Contracts for prison labor are often limited to a certain period; that is, they are prohibited for a longer time than two,[19] four,[20] five,[21] ten,[22] or twenty[23] years, and the time of labor may not exceed eight[24] or ten hours a day.[25]

Pa. Dig., 1661; O., 7388–58; Minn., *ib.*, 7; Col., 1887, p. 232; Ga., 4310; Wy., 33729; U. S., 1887, 213; except on the "piece" or "process" plan, N. J., O., Minn.

[11] Vt.; R. I., 254, 10; Ind., Ill.; Mich., 9709; Kan., 6440; Neb., Va., W. Va., Ky., Tenn., Ark., Nev., Dak., *ib.*; Tex., 3572; S. C., 1885, 64; Fla., 3065; N. M., Ariz., 2424.

[12] Ind., Mich., 9709; Neb., Md., W. Va., Ky., Tenn., Ark., Tex., 3577, 3604; Nev., 1406; S. C., 2729; Ga., 4813 (a); Ala., 4595; Miss., Fla., N. M., 488; Ariz.

[13] Io., 6137; O., 6801; Va., 4133; W. Va., N. C., Col., S. C., 1885, 64; Tex., 3591; Ida.

[14] N. C., 3433; 1889, 314; Va., 4136.

[15] Wy., 3374; Io., 6137.

[16] Va., 4136.

[17] Ark.

[18] Me.

[19] Two years; N. M., Mich., Minn., 7497.

[20] Fla., 3065.

[21] O., Nev., Dak., Pol. C., p. 710; Vt.

[22] Ky., Mo., Kan., 6442; Ore.

[23] Ga.

[24] Minn., Io. Eight hours in winter, ten in summer; Mo., 7214.

[25] Kan., 6446; W. Va., Tenn., Ore., Kan., Fla., 3033.

In states where prison labor is authorized only in the gaol limits, it is frequently subject to strict limitation by law. Thus it is usually to be employed, so far as practicable, upon industries which do not exist outside in the state,[26] or so as to compete as little as possible with free labor.[27] So far as possible, prison labor is to be devoted to the manufacture of articles for the use of the state and county institutions ;[28] and in some the labor is to be of the hardest and most servile kind,[29] in others only so much as may be necessary for the prisoners' health.[30] And in some states no machinery may be used not propelled by hand or foot power.[31] There is a recent statute in several states requiring that all prison-made goods must be so labelled ;[32] but this law applies (except in Maine) only to goods made out of the state,[33] and was therefore, in New York, declared unconstitutional.[34]

So, " It shall be unlawful for the state, its offi-

[26] Me., 1887, 149 ; Col., 1889, p. 427.

[27] Ct., 3355 ; Mass., 1887, 447 ; 1888, 403 ; Ga., 4310 ; Wy., 3375 ; Minn., 1889, 255.

[28] Mass., O., Minn., N. J. Sup., p. 969, § 21.

[29] D. C., 1126.

[30] Wy., 3375.

[31] Mass.

[32] Me., 1887, 149 ; N. Y., 1887, 323 ; N. J., 1887, 176 ; Pa. Dig., p. 1661 ; Ind., 1895, 162.

[33] O., 1888, 92 ; N. Y., 1894, 698 ; Ind., *ib.*

[34] **People** *v.* Hawkins, 32 N. Y. Sup., 524.

cers or representatives, or any county, city, or town, or their officers or representatives, to knowingly bring into the state, or cause to be brought into the state, any material for use in the erection of or repairing of, any public building, the labor in preparing which or any part of which has been performed by convicts." [35]

And in Indiana, no person can sell convict-made goods without a license; and there are other elaborate provisions for returns and regulations.

No person confined in any penitentiary, or other place for confinement of offenders, under the control of the state, shall be employed in or about the manufacture or preparation of any drugs, medicines, food or food material, cigars or tobacco, or any preparation thereof, pipes, chewing-gum, or any other article or thing used for eating, drinking, chewing, or smoking, or for any other use within or through the mouth of any human being.[36]

§ 41. **Industrial Education.**—The apprenticing of minors is regulated in all the states; but most of the statutes upon this subject are old laws, as the practice has generally fallen into disuse. See, however, Ala., 1890, 51. For refer-

[35] Col., 1887, 232, 3.
[36] Ct., 1895, 153.

ences to the statutes, see Vol. I., Stimson's Am. Stat. Law, Art. 666. The enticement and harboring of apprentices is sometimes forbidden by more recent statutes. Compare § 5.[1]

Provision is now made in many of the states for industrial training, or the teaching of manual arts in the public schools.[2]

In New Jersey and New York provision is made for free lectures to working people on natural science and kindred subjects, and the purchase of books, stationery, charts, and other things necessary. These lectures are given in New York in the evening in public school-houses, one at least in each ward.[3]

In Pennsylvania special legislative encouragement is given to the Pennsylvania Museum and School of Industrial Art, which is declared to be the only institution of its kind in the United States.[4]

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[1] See Md., 1890, 811.

[2] For special statutes upon this subject, see N. J., 1887, 173; 1888, 38; 1895, 294; Ct., 2118; N. Y., 1888, 334; O., 1887, P., 92; Io., 1621; 1874, 64; Ga., 1273; 1885, 423; Wy., 1895, 88. In other states it is provided for in many cases by the general school law.

[3] N. Y., 1888, 545; N. J., 1895, 48.

[4] Pa., 1888, 88.

CHAPTER IV

PROFIT-SHARING, CO-OPERATION, AND LABORERS' STOCK

§ 42. **Co-operative Associations.**—The constitution of Wyoming provides that the legislature shall provide by suitable legislation for the organization of mutual and co-operative associations or corporations.[1]

The laws of several states provide for co-operative associations to carry on any ordinary manufacturing or distributive business. Of these the statutes of Massachusetts, Connecticut, New Jersey, and Minnesota are somewhat similar.[2] They provide that seven or more persons may associate themselves with a capital between $1,000 and $100,000 (in Ct. $50,000) for the purpose of carrying on any mechanical, mining, manufacturing, agricultural, quarrying, or printing business, etc. Such corporations must distribute their profits and earnings among their workmen, purchasers, and stockholders at cer-

[1] Wy. Const., Art. 10, § 10.

[2] Mass., 106, 9, 72 & 73; Ct., 1895–1904; N. J. Sup., p. 138; Minn. G. S., 34, 155, 165.

tain times and in such manner as prescribed by their by-laws, but at least (except in Connecticut) as often as once in twelve months. Except in New Jersey, no person may hold shares in such co-operative association to an amount exceeding $1,000 at their par value; and in all states no stockholder is entitled to more than one vote on any subject, and this provision is commonly followed in all such statutes. In Massachusetts, Connecticut, and New Jersey no distribution of profits can be made until at least ten per cent. (in New Jersey 5 per cent.) of the net profits has been appropriated for a sinking fund, until there has been accumulated a sum equal to thirty per cent. (in Connecticut 20 per cent.) in excess of its capital stock. No certificate of shares shall be issued to any person until the full amount thereof shall have been paid in cash. No person shall be allowed to become a shareholder in such association except by the consent of the managers of the same.[3] The members are liable ratably upon dissolution for debts.[4]

Similar laws exist in several other states.[5]

[3] Minn. G. S., 34, 162; Ct., 1902; N. J., p. 140.

[4] N. J.

[5] In New York any number of persons, not less than three, may form a co-operative association, with a capital of not less than one thousand dollars, and must use the word "co-operative" as part of their corporate or business name, but are liable ratably for debts, etc. N. Y., 1867, 971; and so

§ 43. **Special Stock.**—In Massachusetts there is a law providing for special stock which may

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in Kansas, each member having one vote. (Kan., 1456-58.) In Pennsylvania, co-operative associations, protective and distributive, may be incorporated by five or more persons, whose stock capital shall consist of the amount standing to the credit of the members; and there may be two classes of shares, one of which, known as "permanent stock," shall not be withdrawable, but may be transferred subject to the by-laws, and each member must hold at least one share thereof; and the other class, "ordinary stock," which may be repaid, transferred, or withdrawn in accordance with the by-laws. The shares of either class, in amounts from five to twenty-five dollars each, may be paid for by installments, or otherwise, or by the interest thereon, or by profit dividends. No amount of stock to be held by any one person or firm shall exceed one thousand dollars, unless specially consented thereto, and no member to have more than one vote, to be given in person, and not by proxy. Minors may hold such shares. All transactions between such association and its members or other persons shall be for cash, the members to be severally and jointly liable for all debts for labor, and for other debts lawfully incurred to the amount of their unpaid capital stock and no more, and such company may be authorized to invest its funds in stock of other similar co-operative associations. (Pa. Dig., p. 389.) And by a recent statute, with the preamble that, "whereas associations of capital are protected by law, associations of labor should have the same privileges," it is enacted that five or more employees, three of whom must be citizens of the United States, may form themselves into an association for their mutual aid and benefit and protection in their trade concerns, with the ordinary corporate powers and authority to hold indefinite amounts of real estate and personal property, and adopt by-laws, etc., not inconsistent with law. (Pa., 1889, 194.)

be issued to the employees only of any corporation by vote of the general stockholders. The

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This preamble is a glittering generality, but rather a dangerous one, as it would seem to be easy for any five persons who call themselves employees thereby to form a corporation with practically unlimited powers in holding real estate, etc., which is distinctly not a privilege granted to ordinary corporations of capital. It has been omitted from the new Digest. Pa. Dig., p. 2017.

In Wisconsin, any number of persons, not less than five, may form a co-operative association to carry on any trade or business with shares of a par value from one to ten dollars, and such association or its members may own shares in any similar association not exceeding one-third the capital stock thereof, but having only one vote therein. The capital stock is exempt from execution or attachment except for debts of the association, and members are liable for such debts to an amount equal to the par value of their paid-up capital stock proportionately, and such associations may sue and be sued, hold property, and have all the rights and privileges of other corporations or citizens. Wis., 1887, 126.

In Michigan, five or more persons may unite as a co-operative association for purposes of distribution or manufacture or agriculture, with capital stock consisting of shares from five to twenty-five dollars in par value, and not less than five thousand nor more than five hundred thousand dollars in amount. But both stockholders and directors are severally and jointly liable for all debts for labor performed for said corporation. Mich., 3935-3940.

"A co-operative business corporation is a corporation formed for the purpose of conducting any lawful business and of dividing a portion of its profits among persons other than its stockholders. Co-operative business corporations shall be formed under and governed by Division First, Part IV., Title 1, of the civil code of the state, and when so formed, may,

par value of such stock is only ten dollars, and may be paid for in instalments. Such special stock shall not exceed two-fifths of the actual capital of the corporation. Whenever a dividend is paid, the holders of such stock receive their full proportionate share. Special stock can only be sold or transferred to employees or to the corporation itself, and the by-laws may provide as to the number of shares of such stock which may be held by any one employee, and the methods of transfer and redemption of such stock in case any person holding it cease to be an employee. (Mass., 1886, 209.)

This statute has not, however, proved effective, and it has not been copied in other states.

§ 44. **Profit-sharing.**—Except as above and in section 42, there have been no statutes passed in

in their by-laws, in addition to the matters enumerated in section three hundred and three of said code, provide:

"1. For the number of votes to which each stockholder shall be entitled, and,

"2. The amount of profits which shall be divided among persons other than the stockholders, and the manner in which and the persons among whom such division shall be made." Cal. Civil Code, 1878, p. 63, § 1.

"There is also a recent and elaborate statute providing for the incorporation of co-operative associations for any lawful business, in which "the rights and interest of all members shall be equal, and no member can have or acquire a greater interest therein than any other member has," wherefore it appears likely to become a dead letter. See Cal., 1895, 183.

any of the states regulating the subject of profit-sharing in the ordinary way. There is, however, no legal objection to an employer's determining wages or part of the wages paid by the amount of profits of the business, and such a relation will not effect a partnership between him and his employees. It is possible, however, that such an arrangement would be difficult, if not impossible, in states where weekly payment laws exist. (See discussion of this subject in section 21.)

CHAPTER V

STATE REGULATION OF FACTORIES, MINES, AND WORKSHOPS

§ 45. **The Factory Acts.**—(See also §§ 17, 18.) The precedent of the English factory acts passed originally in 1831 has been very generally followed in nearly all the states. The right of the state legislatures to impose such regulations by law rests upon the Police Power, which we have discussed in § 4. Such statutes are doubtless constitutional in any case where the reason of the regulation is based upon considerations of the public health, safety, and comfort, or the health and morals of the operatives, and is apparent on the face of the statute; but it will not do, under the guise of police regulation, to pass statutes of which the real purpose is different, even though they be in the interest of any particular trade or otherwise desirable. Such regulations or reformations can only be attained by combination among the workmen themselves to see that they are complied with.

The statutes which have been passed on this subject are very many in number, but among the more important may be mentioned the following:

Statutes providing for the preservation of the health of employees in factories by the removal of excessive dust, or for securing pure air, or requiring fans or other special devices to remove noxious dust or vapors peculiar to the trade;[1] statutes requiring guards to be placed about dangerous machinery, belting, elevators, wells, air-shafts, etc.;[2] statutes providing for fire-escapes,[3] adequate staircases with rails, rubber treads, etc.;[4] doors opening outward, etc.;[5] statutes providing against injury to the operatives by the machinery used, such as laws prohibiting the machinery to be cleaned while in motion, or from being cleaned by any woman or minor;[6]

[1] Ct., 1893, 204; N. Y., 1892, 673; N. J. Sup., p. 773, 25; Pa. Dig., p. 866; Mich., 1895, 184; Md., 27, 148. Against noxious vapors by fans, etc., see: Mass., 1894, 508, 38 and 39; R. I., *ib.*, 9; N. J., *ib.*, 24; Mich., 1887, 136; Mo., 8220; Cal., 1889, 5; La., 1890, 123.

[2] Mass., 104, 13, 14; R. I., 1894, 1278, 5, 6; Ct., 2265, 2266; N. Y., *ib.*, 16 and 18; O., 2573 c; Mich., Wis., 1887, 549; N. J.; Pa. Dig., p. 865.

[3] Me., 26, 26; Mass., 1888, 316; P. S., 104, 15–18; Vt., 1892, 83; R. I., 1890, 286; Ct., 2645, 1855, 254; N. Y.; N. J., 1890, 63; Pa.; O., 2573; Ill., 1885, p. 201; Mich., 1875, 1841, 6; Wis., 4575 a; Minn., 24, 263; Del., 1881, 546; Va., 1890, 199; Mo., 8220; Dak., 1887, 544; Ga., 1889, 610; La., 1888, 87; D. C., 1887, 45; Wash., 1891, 81; Mon., 1891, 282; Wy., 1891, 80.

[4] Mich., 1895, 184, 7; N. Y.

[5] Mass., 104, 19; N. J., 1887, 177, 6; Wis., 1636 c; Mich., b; Miss., 2088; Dak.

[6] Mass., Ct., N. Y., N. J., *ib.*, 17; R. I., *ib.;* Mich. Compare §§ 14, 17, 18.

laws requiring mechanical belt shifters, etc.,[7] or connection by bells, tubes, etc., between any room where machinery is used and the engine-room;[8] laws aimed at overcrowding in factories,[9] and at the general comfort of the operatives; and many special laws in railways, mines, and other special occupations, such as the laws requiring warning guards to be placed before bridges upon railroads,[10] requiring the frogs and switches or other appliances of the track to be in good condition and properly protected by timber or otherwise,[11] providing automatic couplings to both freight and passenger trains,[12] and, in building trades, providing for railings upon scaffolds and for suitable scaffolds generally.[13]

There are most elaborate statutes and several constitutional provisions regulating the conduct of mining industries, the condition of mines, the use of safety cages, etc., in the states where the mining industry predominates.[14]

[7] N. Y., *ib.;* Pa., *ib.*, 17; Mich., *ib.*

[8] Mass., 1886, 173; 1890, 179.

[9] N. J., *ib.*, 23; Wis., 1636 f; Mo., 8220; N. Y., *ib.*, 14; Md., La.

[10] N. Y.

[11] This statute is being rapidly adopted in all the states.

[12] R. I., 1884, 1282.

[13] N. Y., 1889, 214; 1885, 314; Md., 1894, 158.

[14] N. Y., 1890, 144, 394; Pa., 1885, 169; 1891, 177; Ind., 1891, 49; Io., 1884, 21; O., 290–306, 6871; Vol. 83, pp. 165–182; Mich., 1887, 213; Md. Loc. L., 1888, 196–209; Mo., 7061–7077; Wash., 1891, 81; Mon., 1891, p. 282; Wy.,

Both manufactories and mines are, in nearly all these states, submitted to some kind of public inspection to see that these regulations are in force, and in many states there are special inspectors appointed for the purpose;[15] in others the matter is left to the state labor bureaus, the board of health, the local authorities, or the chief of police.[16] An appeal from their decisions or orders may be taken to the courts.[17]

Employers are frequently permitted or required to ring bells and use whistles in towns and cities, for the purpose of waking their employees or giving them other notice.[18]

For purposes of this act, a factory is in some states defined to be any factory where five or

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1891, 80; Wy. C., Art. 9; Wash., 1888, 21; 1890, 121; Dak., 1890, 121; Mon., 1889, p. 160; Pol. C., 3350–3365; N. M. Tit., 26.; O., Vol., 85, pp. 106, 325; Vol. 86, p. 381; Ind., 5458–5480, Sup. 1755–1783; Ill. Const., 4, 29; 93, 1–19; Kan., 3442–3474; W. Va., 1890, 9; Ky., 1883–4, 1335; Tenn., 1887, 247; Cal., 1872, p. 633, 1874; Md., 127; Nev., 296; Col. Const., Art. 16; G. S., 176–195.

[15] Mass., 104, 4, 1894, 48; R. I., 1894, 1278, 3; Me., 1893, 220; Ct., 2264; N. Y., 1892, 673; N. J., 1894, 54; Sup., 1886, p. 407, 12, 13; Pa. Dig., p. 865; O., 2573 a; Ill., 1893, p. 9; Wis., 1021 b; Minn., 1887, 115; Mich., 1895, 184, 12; Tenn., 1891, 157. One or some of these must be women. (R. I., Pa.)

[16] Mich., 1895, 184, 12; La., 1890, 123.

[17] R. I., 1894, 1278, 10; Ct., 1895, 206.

[18] Mass., 1883, 84; Vt., 1890, 75.

more persons are employed[19] (see also § 13); and any such factory, or any factory, workshop, mercantile or other establishment or office in which two or more children or women are employed must be kept in a cleanly state.[20] So, in some states, factories must be limed or painted once a year, or when so ordered by the inspector.[21]

In Washington there is also a statute providing for the sobriety, capability, and age of the operatives employed.[22]

There are frequently statutes forbidding the employment upon a railroad of any person in the habit of using intoxicating drinks under penalty to the corporation.[23]

In Pennsylvania, by a special statute, a mandamus is given to any person to obtain an order from the owners of mines to work for and recover the bodies of miners entombed in coal mines.[24]

Accidents to employees in factories, etc., must commonly be promptly reported to the state inspectors above mentioned.[25]

For laws relating to the hours of employment,

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[19] Mass., 1894, 508, 33; Mich., *ib.*, 10; R. I., 1894, 1278; Cal., one or more; N. J.

[20] Md., 27, 148; Mass., *ib.;* Cal.

[21] N. J., 1887, 177, 8; N. Y.

[22] Wash., 1891, 81.

[23] Mich., 3367.

[24] Pa. Dig., p. 1340.

[25] Mass., 1890, 83; R. I., 1894, 1278, 7; N. Y., N. J. Sup., p. 772, 15; Pa., *ib.*, 18; O., 7458-2.

etc., of women and children in factories, see §§ 13, 15, 18.

§ 46. **Sweatshops.**—A few of the state legislatures are beginning to turn their attention to the abuse of sweatshops, and the danger of tenement-made goods. Thus, in New Jersey and Massachusetts, the manufacture of clothing, etc., in tenements or dwelling-houses can only be carried on under written permit from the state official inspector.[1] Such dwelling-houses or workshops are made subject to official inspection.[2] No room used for eating or sleeping purposes shall be used for the manufacture of clothing, tobacco, etc., except by members of the family living therein.[3]

In some states the manufacture of certain articles, such as clothing, artificial flowers, and cigars, is absolutely forbidden in apartments, tenements, and living rooms, except by families living therein;[4] and in New York and Illinois the manufacture of cigars and preparation of tobacco was prohibited in tenement-houses on any floor partly occupied for residence purposes, but this statute was declared unconstitutional.[5]

[1] Mass., 1894, 508, 44; N. J., 1893, 216; Pa., 1895, 20, 1.
[2] Mass., *ib.;* N. Y., 1892, 655; Ill., 1893, p. 99; Pa., *ib.*, 2.
[3] N. Y., Ill., *ib.*
[4] N. Y., 1892, 673, 13; Pa., *ib.*, 1; N. J.
[5] N. Y., 1884, 272. See In re Jacobs, 98 N. Y., 98.

Such workshops are generally to be kept in a cleanly state,[6] and the inspector may report them to the board of health.[7] The sale of goods made in tenements in violation of this law is prohibited,[8] and several states now provide that all tenement-made goods must be labelled accordingly.[9] The inspector has authority to examine the raw material or the goods manufactured,[10] and may at any time invoke the board of health. In Massachusetts he has also authority to examine garments imported into the state.[10] In New York, employers of labor in sweatshops must keep a register of all persons to whom they give work.[11] For purposes of this section a workshop or sweatshop is defined in Massachusetts to be "any premises not being a factory wherein manual labor is exercised by way of trade or for purposes of gain, and over which premises the employer has the right of access or control; provided that the exercise of manual labor in a house or room by the family dwelling therein, or by any of them, or in case a majority of the persons therein employed are members of such family, does not in itself make such house a workshop."[12]

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[6] N. Y., 1892, 655; Ill., Mass., *ib.*

[7] Mass., *ib.*, 45; N. Y.; Ill., *ib.*, 2.

[8] N. Y., Ill., *ib.* 3

[9] Mass., *ib.*, 47; N. Y., *ib.*, 4; 1893, 173.

[10] Mass., *ib.*, 46.

[11] N. Y., 1893, 173; Pa.

[12] Mass., *ib.*, 57.

In two states premises "in the rear" of a dwelling-house cannot be used in the manufacture of such articles as are subject to the law without an official permit.[13]

In New York any building occupied by more than three families was declared to be a tenement-house,[14] but the whole statute was held unconstitutional.

The constitutionality of all such laws as prohibit the carrying on of any lawful industry in a person's own home is, of course, subject to question. As noted above, a New York law prohibiting the manufacture of cigars in tenement-houses on any floor partly occupied for residence purposes, was declared unconstitutional, the court holding, in substance, that it did not clearly appear on the face of the law that its primary object was to secure the public health. And a considerable portion of the Illinois statute was invalidated by Ritchie *v.* Illinois. See § 11.

§ 47. **Intelligence Offices and Employment Agencies.**[1]—So far as there is a legal distinction

[13] Pa., 1895, 20; N. J.

[14] N. Y., 1884, 272.

[1] Mass., 1894, 180; Me., 1895, 156; N. J., 1893, 41; N. Y., 1888, 410; Minn., 1805, 205; Mo., 3583; Col., 1889, p. 204; 1891, p. 188; La., 1894, 58; 1891, p. 188.

Thus, in Massachusetts the keeper may not receive pay unless employment of the kind demanded is furnished; and

between the meaning of these two terms, it would appear that the former was limited to domestic

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if the person is discharged without fault within ten days, he can recover five-sixths of the sum paid to the keeper, and this act must be printed on the licenses.

In Minnesota and Colorado it is provided that no person shall engage in the business of keeping an employment bureau or office, or agency for the purpose of hiring men to work for others, and receiving compensation therefor, without having obtained a license, under penalty of misdemeanor, and such license is granted upon payment of one hundred dollars, and filing a bond conditioned for the payment of any damage which any person secured or engaged to labor for others by the keeper of the office may sustain by reason of any fraud or misrepresentation on the part of such keeper; and if any person hiring to work for others by such keeper fails to get employment according to the terms of the contract by reason of any unauthorized act, fraud, or misrepresentation on the part of the office keeper, he may bring an action upon said bond and recover full damages.

In Louisiana a permit from the mayor and a $5,000 bond to answer for frauds, misrepresentations, etc., is required. In New Jersey the council of a city may require a bond and fix the compensation.

In Maine the keeper of an intelligence office shall not retain any sum above one dollar, or any sum whatever (?), from a person seeking employment, unless employment of the kind sought for is actually furnished; and licenses are required.

The intelligence office law applying to New York state provides in substance that keepers must be registered and procure a license, under penalty, which license shall only be granted to persons of good general character by the mayor, and may be revoked if the keeper charge a fee for obtaining a situation, when no such situation was, in fact, open, unless

service, the latter to general employment. There is provision in a few states for the regulation and licensing of employment agencies and intelligence offices, usually in cities only.

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he refund to the person seeking employment his fares paid in going to and returning from the place of the supposed situation. The keeper must give a receipt for any fees, stating the amount, and the character of the employment they agree to procure, specifying the time in which it is to be furnished, and, in case of failure so to furnish employment, shall refund the full amount of the fee. These provisions of law must be printed on the back of every receipt given for the fees. And for any breach of the law the license may be revoked. The mayor issues licenses yearly, and may require a bond for the faithful observance of these provisions.

In Missouri, "Every person who shall agree or promise, or who shall advertise through the public press, or by letter, to furnish employment or situations to any person or persons, and, in pursuance of such advertisement, agreement, or promise, shall receive any money, personal property, or other valuable thing whatsoever, and who shall fail to procure for such person or persons acceptable situations or employment within the time stated, or, if no time be specified, then within a reasonable time thereafter, and who shall fail or refuse to return the money, personal property, or other valuable things so obtained, when the same shall have been demanded by such person or persons, shall be guilty of a misdemeanor."

And in Colorado, if any person keeping an intelligence office gives false information, or makes false promises, or charges a greater sum than is provided for in the city ordinances, he is guilty of a misdemeanor, and the persons injured by such false representation may sue upon his bond.

State employment bureaus, or free town and city bureaus, have recently been provided in a few states. See Mon. Pol C., 765.

CHAPTER VI

OTHER LEGAL RIGHTS AND LIABILITIES OF MASTER AND SERVANT

§ 48. **As to Third Persons.**—By the common law the master or employer is liable to third persons for any acts or defaults of his servant or servants causing injury to such third persons for which they might recover if done or caused by the master himself, provided only that such acts, if acts, were performed by the servant in or about the execution of his master's business. The common law in this particular has been left untouched by modern statutes in the United States, with the exception that the states have generally passed acts extending the liability of railroads or other common carriers to cases where third persons have been killed by their negligence or default, the default or incompetency of their servants, or the defective nature of their machinery or appliances. Recovery in cases of death is, however, frequently limited to five thousand dollars, or a similar sum, and it may commonly be sued for by the executors, administrators, or widow or heirs of the person deceased.

§ 49. **Liabilities of Servant to Master.**—In this particular the law has not been extended in modern times,[1] and on the contrary the old doc-

[1] The new western codes alone attempt to define the common law on this point, as follows:

One who, for a good consideration, agrees to serve another must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed.

An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee.

An employee must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

An employee is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employers, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

An employee must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

An employee who receives anything on account of his employer, in any capacity other than that of a mere servant, is

trine of petit treason, which made a servant in certain cases liable to extraordinary penalties

not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference. Cal. Civ. C., 1978, 1981-1988; Mon. Civ. C., 2673, 2676–2683.

An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise. Cal. Civ. C., 1989–1991; Mon. Civ. C., 2684–2686.

Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

1. The death of the employer; or,
2. His legal incapacity to contract.

Every employment is terminated:

1. By the expiration of its appointed term;
2. By the extinction of its subject;
3. By the death of the employee; or,
4. By his legal incapacity to act as such.

An employee, unless the term of his service has expired, or unless he has a right to discontinue it at any time without

for breach of faith as against his master, has long since fallen into disuse. It is sufficient,

notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this title.

An employment, even for a specified term, may be terminated at any time by the employer, in case of any wilful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

An employment, even for a specified term, may be terminated by the employee at any time, in case of any wilful or permanent breach of the obligations of his employer to him as an employee.

An employee, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance. Cal. Civ. C., 1996-2003; Mon. Civ. C., 2700-2707.

Master and Servant.

A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely

therefore, to state that a servant is liable to his master, or an employee to his employer, only for

under the control and direction of the latter, who is called his master.

A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piecework, for no specified term.

In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service. Cal. Civ. C., 2009–2012; Mon. Civ. C., 2720–2723.

The entire time of a domestic servant belongs to the master; and the time of other servants to such an extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he receives for his account, without demand; but he is not bound, without orders from his master, to send anything to him through another person.

A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same; or

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of

damages caused by the positive act or neglect of the servant or employee. For such damage the master or employer may, of course, bring suit against the employee; but for obvious reasons this is rarely done, and his more usual remedy is to discharge him. A discharge for such cause may commonly be made without notice or warning (see § 22), and gives no rise to any action by the servant for damages unless engaged by a time contract. And in such cases, if the contract be that the work is to be done to the employer's satisfaction, or a similar phrase is used, the employer's judgment is final and the employee cannot go to the jury on the question whether it was warranted by the facts.

§ 50. **Liabilities of Master to Servant.**—These have been very greatly extended by statute in the various states of the United States. Under the old common-law doctrine an employee was held to take both the risks of the employment and the risks of any injury resulting from any act or neglect of any servant or employee employed by the same master. In this particular the law has been very commonly changed both by court decision and statute. The tendency in the United States has been to hold that the em-

his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him. Cal. Civ. C., 2063–2065; Mon. Civ. C., 2724–2726.

ployee does not assume any risks which might be averted by the greatest care on the part of the employer in the choice and construction of machinery or other appliances, and in the selection of other agents or servants. There has been a very general attempt to abolish the "fellow-servant" doctrine entirely, or at least to provide that it should not apply except to cases where the fellow-servant causing the accident is precisely on a par as to powers and function with the person injured. And finally, there is a very general statute forbidding employers from "contracting out" of such injuries; that is, from causing the employees to sign a contract by which they agree not to hold the employer liable for accidents occurring while they are in his employ, or occurring by reason of careless fellow-servants or imperfect machinery. A few states, furthermore, have attempted to redefine the common law as to injuries to servants and employees while in the employ of the master. Thus in several states all *corporation* employers, and in other states all employers, are made liable for injury to employees caused by defects and condition of the plant, machinery, etc., negligence on the part of the corporation, or any act of omission on its part, or of its fellow-servants.[1] California and Montana, which have adopted the

[1] Mass., 1894, 499; Col., 1893, 77; Ind., 7083; Ala., 2590.

general codes prepared by the late David Dudley Field, of New York, attempt to recast the common law in still greater detail.[2]

In Massachusetts an action is given to the executors or personal representatives of an employee against the employer even in cases of his death, as if he had not been an employee (see § 48), and for damages in cases where such death was not instantaneous or was preceded by conscious suffering.[3]

There are more frequently peculiar statutes relating to injuries on railroads; thus in many states railroads are liable for all damages sustained by any person, including employees, in

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[2] An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in California in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

An employer must in all cases indemnify his employees for losses caused by the former's want of ordinary care. (Cal., 1969–1971); Mon. Civ. C., 2660–2.

[3] Mass., 1894, 499. See also Ala., 2591.

consequence of neglect or mismanagement on the part of other employees, etc.[4]

The "fellow-servant" doctrine is, moreover, specially limited in a few states in peculiar ways, as, for instance, in Colorado, where fellow-servants or employees can recover compensation for injuries resulting from the negligence of a co-employee to the extent of five thousand dollars.[5]

Principals, vice-principals, and fellow-servants are in a few states defined and made into separate classes, so that the employer is only relieved from liability when the injury is caused by a fellow-servant of precisely the same class as the servant.[6] Rather than go into subtilities of this, it would seem better to repeal the common law liability entirely, as the states already mentioned have generally done. Thus, in Ohio,

"In all actions against a railroad for personal injury or death of an employee arising from the negligence of such company or any of its employees, every person in the employ of such company actually having power or authority to direct any other employee, is held not the fellow-servant, but the superior of such other employee, and is not the fellow-servant of employees of any other branch or department

[4] Io., 1307; Kan., 1251; Ga., 3036; Fla., 2346; Mon. Civ. C., 905; Minn., 1887, 13.

[5] Col., 1893, 77.

[6] Tex., 1891, 24.

who have no power to direct or control in their own branch."[7]

Contracting Out.—And the provisions enumerated above are very generally enforced by a law providing that any contract, releasing the employers from their liability to employees in the manner above prescribed in the statutes of the several States respectively, shall be null and void.[8] In other States such contracts only are declared void when they attempt to release the employer from liability for personal injuries which result from the negligence of the employer or other persons in his employ.[9] As this, however, seems to go to the full extent of the common law the two conditions would seem to be much the same thing; and so the constitutions of some of the new states provide that

"It shall be unlawful for any person, company, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility, on account of personal injuries received by such servants or employees, while in service

[7] O., 1890, p. 149, §3.

[8] O., 1890, p. 149; Ind., 7083; Tex., 1891, 24; Wy. Const., 10, 4, 1891, 28; Fla., 2346; but in Ohio the statute applies to railroads only.

[9] Mass., 1894, 508, 6; Ala., 2590; Minn., 1887, 13.

of such person, company, or corporation, by reason of the negligence of such person, company, or corporation, or the agents or employees thereof, and such contracts shall be absolutely null and void." [10]

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[10] Col. Const., 15, 15; Mon. Const., 15, 16; P. C., 923; Wy. Const., Art. XIX., Labor Contracts.

CHAPTER VII

TRADES UNIONS

§ 51. **Trades Unions Legalized.**—Under the common law of England there was an impression, possibly justified, that any trades union or labor combination was in its essence unlawful. Under the old English statutes the rate of wages was limited by law, or by a determination of a magistrate, and it was illegal to pay a higher rate, still more to combine for the purpose of extorting a higher rate. Upon this state of the statute law, the celebrated Journeymen Tailors case, which will be more fully discussed in the next chapter, was decided.

Substantially, however, there has never been any legal determination of rates of wages in this country. What few efforts of the kind were made, under the theocracies of some of the colonies, notably Massachusetts, or the aristocracies of others, like Virginia, or their local town councils and magistrates, all finished with the Revolution. Since then it has never been seriously questioned here that at common law a trades union, that is the combination of the members of a trade for their mutual benefit,

elevation, and protection, was perfectly legal.[1] While the general corporation acts did not expressly mention such associations, they could not, of course, organize as corporations or joint stock companies; but the association, regarded as a voluntary association for whose obligations each member might become liable, was always perfectly legal in all the states of this country, and many states have expressly taken the opportunity to authorize such associations to incorporate themselves under the general corporation acts, whereby each member is relieved, or partially relieved, from individual liability. Such corporations are usually organized under the general head of corporations not for profit, and

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[1] This matter will be more fully discussed under section 55 and below. There were three early cases in New York and Pennsylvania, in inferior courts, which seemed to hold that associations of workmen to raise prices to a certain level were illegal in themselves, but it was established in Pennsylvania as early as 1821, in Massachusetts in 1842, and finally by a well-argued case in New York in 1867, which carefully reviews all the decisions, that such is not the case in this country. See Commonwealth *v.* Carlisle, Brightley's Rep., 36; Commonwealth *v.* Hunt, 4 Met., 111; Stevedore's Association *v.* Walsh, 2 Daly, 1; Snow *v.* Wheeler, 113 Mass., 179.

An ordinary trades union is, of course, a different thing from a combination to effect a specific purpose, such as to raise wages (see § 55), or to force the employers not to employ certain workmen (see § 57). See also below in this section.

having no capital stock. (For the organization of corporations with capital, compare § 42.)

The statutes of most of the states expressly provide for the incorporation of trades unions generally,[2] of the Knights of Labor, of the Far-

[2] Thus, the Massachusetts law provides that seven or more persons may associate themselves to form a corporation for the purpose of improving in any lawful manner the condition of any employees in any lawful trades or employments, either in respect to their employment, or by the promotion of education, temperance, morality, or social intercourse, by the payment of benefits to members if sick or unemployed, or to persons dependent upon deceased members or otherwise.

The by-laws must contain no provision contrary to the law, and the commissioner of corporations must endorse his approval upon the certificate of organization when satisfied that the agreement shows the purpose to be a lawful one; and such commissioner may call for the opinion of the attorney-general thereon.

The by-laws must contain clear and distinct provisions in respect to the manner of electing or admitting members, of expelling members; the officers of the corporation, with their titles, duties, powers, and terms; the manner of electing and removing them; the number required for a quorum; the manner of calling meetings, rescinding or amending by-laws; the purposes for which the funds of the corporation shall be applicable; the purposes for which assessments may be levied; the conditions under which a member, or persons dependent upon a deceased member, shall be entitled to benefits, if any; the manner in which a fine or forfeiture can be imposed, if any; the manner in which the funds are to be held or invested, and the accounts of the treasurer audited, and the manner of voting upon stock to be issued.

By-laws of such corporation can only be made or amended at a special meeting after notice, and when approved by the

mers' Alliance or Grangers, of Knights of Labor building societies, of workingmen's aid socie-

commissioner of corporations. No member can be expelled by less than a majority vote of all the members, nor by less than a three-fourths vote of the members voting. Every member is entitled to examine the books and records of the corporation. Mass., 1888, 134.

In Michigan any number of persons, not less than five, may associate themselves together and become a body corporate and politic for the improvement of their several social and material interests, the regulation of their wages, the laws and conditions of their employment, the protection of their joint and individual rights in the prosecution of their trades or industrial avocations, the collection and payment of funds for the benefit of sick, disabled, or unemployed members, the securing of benefits to the families of deceased members, and for such other and further objects of material benefit and protection as are germane to the purposes of this act.

Such associations are made bodies politic, may sue or be sued, etc., may hold real or personal property, as shall be required for their corporate purposes, may make all needful by-laws, establish a uniform system of dues, assessments, or benefits. Mich., 1885, 145.

In Maryland corporations may be formed by any five persons, citizens of the United States, and a majority citizens of that state, or if unnaturalized, residents of that state, making oath that they intend to become citizens of the United States, for the creation and maintenance of mechanics' institutes, cooperative stores, or societies, provided such corporations are located in the state, and the property they possess is located therein; and also for the formation of trades unions, "to promote the well-being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members, and as beneficial societies." Md. 23, §§ 14, 15, and 37.

ties, and many other specified organizations. And other states have a general provision.

Legal unions may fully enforce their by-laws, penalties, etc., against their members; and these latter have the ordinary legal remedies for expulsion, etc., against the union.[3]

A *mandamus* will commonly lie for a member of a labor union who has been improperly expelled from the same, to reinstate him to membership; and damages will be awarded for loss suffered in consequence of his expulsion, as when he was by reason thereof discharged from employment or unable to procure it.[4] So, in a New York case, the plaintiff, a member of a labor union, brought suit for damages for improper expulsion therefrom, which were awarded him; and he also, it appears, got a *mandamus* for

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In Iowa, trades unions and other organizations of labor, for the regulation, by lawful means, of prices of labor, of hours' work, and other matters pertaining to industrial pursuits, may become incorporated in the manner directed in the preceding chapter, so far as applicable, and shall thereby become vested with all the powers and privileges, and subject to all the liabilities provided by that chapter, except as herein modified (§ 1649).

And by the United States law (1886, Ch. 567) national trades unions may be incorporated for similar purposes, provided they have two or more branches in the several states, with headquarters located in the District of Columbia.

[3] Master Stevedores *v.* Walsh, 2 Daly, 1.

[4] People *v.* Musical Mutual Protective Union, 118 N. Y., 101; People *v.* Coachmen's Union, 24 N. Y. S., 114.

reinstatement as a member of the union. Evidence of the diminution in his earnings caused by his expulsion from the union was allowed, and he was given compensation for the loss approximately resulting from his expulsion.[5]

Labor Combinations other than Ordinary Trades Unions or Associations for Enforcing Strikes or Boycotts.—The matter of strikes and boycotts will be discussed later in Sections 55 and 57, respectively. We have now to consider labor combinations which have some other purpose, and which endeavor to enforce such purpose by penalties or otherwise. In the early part of this century all such combinations were illegal in England, but have since been fully legalized by statute. The 2d and 3d of Edward VI., Chapter 15, passed in 1548, forbade "all conspiracies and covenants of workmen not to make or do their work but at a certain rate or price." In 1721 the statute of 7 George I., Chapter 13, was passed, which punished by imprisonment agreements between tailors for advancing their wages or lessening their hours of work. The statute also fixed the rate of wages,

[5] Merschiem *v.* Musical Mutual Protective Union, 24 Abbott, N. C., 252. See valuable note by John H. Wigmore, in 21 Am. Law Rev., showing that a man may have an action for damages if his customers are intimidated from trading with him, and note by Austin Abbott, 24 Abb., N. C., p. 262.

and similar statutes were extended to other trades. Again, in 1796, Chapter 3 of 36 George III. made provision for suppressing combinations among workmen for raising their wages, and in 1799, 39 and 40 George III., Chapter 81, this was repeated in the so-called Combination Laws designed to suppress all combinations of workmen to raise wages. All contracts for shortening hours or obtaining an advance of wages, except between a single journeyman and his master, were punished by three months imprisonment. This statute, perhaps, marks the culmination of adverse legislation upon this subject;[6] it was, however, repealed in the following year.[7] But this latter act still made it criminal for any person to attend a meeting held for the purpose of making or entering into any contract or agreement declared illegal by the act, or for entering into, or conspiring, or maintaining any combination for any purpose declared illegal by the act, or to give notice, or call upon, or persuade by intimidation or any other means, any workman or other person to attend such meeting, or to collect any money for such purpose, etc. This is probably the most drastic statute that was ever passed in the direction of confirming and extending the

[6] See Publications American Academy of Political Science, No. 123, "Peaceable Boycotts," by Chester A. Reed.

[7] See 40 George III., Chapter 106.

principle of the Journeymen Tailors case, but it only held its place on the statute book twenty-five years. Other of its provisions will be further discussed in § 57, when we are considering boycotts. But in 1824, 5 George IV., Chapter 99, was passed, which began the modern view in England. It provided that no workman entering into a combination to advance wages or lessen working time, or to induce another to depart from his service before the time for which he is hired, or to refuse to enter into work, or to regulate the mode of carrying on any manufacture, trade, or business, should be subject to prosecution for conspiracy or any criminal punishment. This radical statute was repealed the following year (6 George IV., Chapter 129), but the repealing act still provided that no persons should be subject to punishment who meet together for the sole purpose of determining the rate of wages which they shall demand or the hours which they shall work, or who enter into an agreement among themselves for the purpose of fixing the wages or prices which the parties entering into such agreement shall demand, or the hours during which they shall work. The subsequent sections of the act related to intimidation, and forbade the forcing of employees to enter into such associations, or the coercing employers to make any alteration in their mode of business

or regulate their mode of carrying it out, or otherwise molesting them. It is now easy to see why the early American cases, following English cases based upon such statutes, and in particular the Journeymen Tailors case, decided as they did. Nevertheless they were probably, on that point, ill-decided, and have long since been overruled. But it is important to notice the distinction, well taken in Master Stevedores *v.* Walsh, above cited, between the legality of such trade combinations which only seek to control their own members in their own action and impose penalties upon them alone, and combinations which seek to control the employer, in the management of his business, or other workmen. These latter combinations would nearly always come under the head of boycotting; and in so far as the early American cases dealt with combinations of this sort, the cases are still of some authority. They held substantially that a combination of journeymen to prevent any journeymen from working below certain rates, or to prevent master workmen from employing anyone except at certain rates, or who was not a member of their union, was unlawful, and that the parties taking part might be indicted for conspiracy. But at that time a combination among laborers to raise wages was in itself a criminal conspiracy in England (see § 55), and the first case therefore also held such a combi-

nation indictable; and this is not now the law. The cases are as follows:

Boot and Shoemakers of Philadelphia (pamphlet specially printed), 1806.

People *v.* Melvin, 2 Wheeler Criminal Cases (N. Y.), 262.

Journeymen Cordwainers of Pittsburg, pamphlet (1811).

People *v.* Fisher, 14 Wendell, 1 (N. Y., 1835).

This last was a case where a combination of journeymen shoemakers in the village of Geneva, for the purpose of preventing any shoemaker within or without the combination in the village from working below certain rates under penalty of fine, and with mutual agreement that they would not work for any master who should employ a journeyman who infringed their rules, was declared a criminal conspiracy. The only statute then existing was one declaring conspiracies to commit any act injurious to trade or commerce a misdemeanor.[8]

It is doubtful whether any of the above cases really embody the principle that a combination of laborers among themselves, and aimed only at controlling their own action, is illegal; but in so far as they do take that view, following the Journeymen Tailors case, they have been overruled by the cases cited in note 1 above. And

[8] 2 N. Y. R. S., 2d ed., Vol. II., p. 577.

the case of the Master Stevedore Association *v.* Walsh expressly affirmed the legality of a combination of stevedores and of a by-law regulating the prices for which they should work, and another imposing a fine of twenty-five per cent. of the amount earned against any member who should be found guilty of working for less. Suit was brought by the corporation against the defendant for such a fine, and the demurrer to the suit was overruled.

We therefore conclude that in the United States combinations of laborers or employers, in their collective capacity to fix wages or make other rules binding among themselves, are legal. (For such combinations as are illegal, as where the object is to molest or obstruct workmen or coerce employers or other persons, see § 55, Strikes; §§ 57–59, Boycotts.)

For it has never been the common law in this country that a mutual agreement among journeymen for the purpose of raising their wages is an indictable offence, or that they are guilty of a conspiracy if by preconcert and arrangement they refuse to work unless they receive an advance in wages. (See § 55, Strikes.) It is lawful for any number of journeymen to agree that they will not work below certain rates, or for masters that they will not pay above certain prices; and only combinations for the purpose of compelling journeymen or employers to conform to any rule

or agreement to which they are not parties, by the imposition of penalties, by boycotting, or by the threat of strikes, is an unlawful conspiracy. These are substantially the words of Judge Daly in the New York case, and they seem to express the American law.[9] And a society of Knights of St. Crispin, organized "to resist encroachments of the masters," and having a by-law forbidding any member to teach the trade without consent of the society—"there being no unlawful coercion to control the freedom of the individual"—is lawful.[10]

Nevertheless there are some recent startling decisions the other way in the courts of a few states, even in the case of employees' combinations; while in the case of employers, or manufacturers of articles, the tendency of American courts has been almost universally to prohibit combinations to limit price. All these decisions rest not on the law of labor combinations, but on the old common-law principles of combinations in restraint of trade; and this tendency of the courts has been much accelerated in the United States by the popular prejudice

[9] Among cases since the decision of Commonwealth *v.* Carlisle which further confirm the view stated in the text, see also Journeymen Tailors of Phila., pph., 1827 (copied in Cogley on Strikes, p. 70). Hartford Carpet Weavers case, pph., 1836.

[10] Snow *v.* Wheeler, 113 Mass., 179.

against trusts, and by the numerous and radical statutes which have been enacted making all trusts or trade combinations illegal (see § 54). The result is that, while the American courts generally have a tendency to destroy combinations among employers, many of them have an equally strong tendency to uphold combinations among employees; and when based upon the vague principle of restraint of trade, as there is frequently no radical difference between the case of employers and employees, their decisions become irreconcilable. For instance, in 1892, the Supreme Court of Illinois held that "an association of stenographers, formed to establish and maintain uniform rates of charges, and to prevent competition among its members under certain penalties, is illegal, as in restraint of trade and against public policy, and one member cannot maintain an action against another for damages occasioned by the latter underbidding the former, in violation of the rules of the association." [11] Now, this was a clear case of a combination among employees. The sole article the parties entering into the combination had to sell was labor, and the fact that the labor was of a skilled nature makes, of course, no difference. The only cases cited in the opinion were cases of a combination among producers of commodities.

[11] More *v.* Bennett, 29, N. E. Rep. 888.

If we are (and such is the general American law to-day) to take a distinction between combinations of producers to fix prices of commodities, and combinations of employers and employees to fix wages of labor, and hold the latter legal while the former are not, the Illinois case must be held bad law; though a distinction cannot fairly be taken between employers' combinations and employees' combinations, as what is legal for one should be legal for the other. In *More v. Bennett* there was no boycott, no unlawful conspiracy, nothing but an association of a portion of the stenographers in Chicago to work at certain rates, a rule of their society imposing a penalty for non-conformity with such rates, and the attempt of certain members of the society, or the society itself (for the court expressly say that they will take no exception to this point, but will admit that there was a valid contractual relation) to enforce said rule by recovering damages from its own members. We do not see, therefore, how this decision can be sustained.

And finally, there are in a few states, statutes on this subject.[12]

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[12] In New York (P. C., § 170) . . . "the orderly and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy."

And so, by a New Jersey statute, it is not unlawful for any

§ 52. **The Legal Protection of Labor Unions.**— Besides the authority to incorporate referred to in the last section, there is a statute being very rapidly adopted throughout the states, making it a misdemeanor for any employer to discharge employees for joining labor unions,[1] or even to exact pledges from employees, or making a contract not to join any union, as a condition or preliminary to employment.[2]

Massachusetts has a saving provision, how-

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two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons, or corporation: N. J. Sup., p. 774, § 30; which statute is re-enacted in Colorado with the following addition: that such combinations are further not illegal when "in relation to the amount of wages or compensation to be paid for labor, or for the purpose of regulating the hours of labor, or for the procuring of fair and just treatment for employees, or for the purpose of aiding and protecting their welfare and interests in any other manner not in violation of the constitution of this state or the laws made in pursuance thereof: *Provided*, That this act shall not be so construed as to permit two or more persons, by threats of either bodily or financial injury, or by any display of force, to prevent or intimidate any other person from continuing in such employment as he may see fit, or to boycott or intimidate any employer of labor."—Col., 1889, p. 92.

[1] Ind., 1893, 76; Ill., 1893, 98; O., 1892, p. 269; Mass., 1894, 508, 3; N. Y. P. C., 171a; N. J., 1894, 212, 2; Wis., 1895, 240, 4; Cal., 1893, p. 149; Mo., 1893, p. 187; Ida., 1893, p. 152.

[2] N. Y, N. J., Ind., Mass., Wis., Mo., Ida.

ever, that no organization shall be considered a labor union, within the meaning of this act, whose officers, agents, or members seek directly or indirectly to accomplish its objects or purposes by intimidation or force, or other unlawful means.[3]

The constitutionality of the above statutes is very seriously open to question. It has been expressly held during this last summer, by the Supreme Court of Missouri, that such a law was unconstitutional.[4] It is possible that while employees are under a definite contract, a discharge before the legal term of the contract for cause of joining a labor union might be forbidden by statute, and the statute not set aside by the courts ; but to prohibit an employer from choosing to employ laborers who are not union men on the condition express or implied that they remain so, or to forbid him to end a contract terminable at his pleasure whenever he choose, is the clearest sort of interference with individual liberty, and cannot possibly come under the exception of the police power. In Massachusetts alone may possibly these statutes be maintained. The other states are more likely to follow the rule of Missouri and hold all such laws void.[5]

[3] Mass., 1894, 437. [4] State *v.* Julow 31 S. W., 781.

[5] Davis *v.* Ohio, 30 Wkly. L. B., 342, to the contrary, was decided with little argument and in an inferior court ; never-

Laborers and laborers' unions have an entire right to seek to compel employers to deal solely with union men by all proper means—as by persuasion or even by a properly conducted strike;[6] but when they seek to impose such compulsion upon the employer through the hand of the state, still more when so doing is made a crime, the law effecting this result, though passed by a majority, is none the less a tyranny in a free country.[7]

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theless, so long as it stands, it renders the Ohio statute constitutional. The Missouri case, decided June 18, 1895, held expressly that such a statute was an interference with liberty of contract, and was also class legislation. See § 11.

[6] Thus in Johnson Harvester Co. *v.* Meinhardt, 60 How. Pr., 163, an injunction against members of a labor union for enticing workmen in the employ of plaintiff to leave work was refused.

[7] So in Platt *v.* P. & R. R. R. Co., 65 F. R., 660, the court held that the receivers of a railroad, though officers of a federal court, had a perfect right to discharge all union employees if they chose. Judge Roberts, in the case of the Pittsburg Cordwainers (Cogley, p. 65), said:

"A conspiracy to compel an employer to have only a certain description of persons is indictable. It is a subversion of the liberty of the citizen. It has a direct tendency to restrain trade and create a monopoly. A conspiracy to prevent a man from freely exercising his trade or profession, in a particular place, is indictable." To the same effect see People *v.* Hughes: Ray, Contractual Limitations, p. 356. The case of State *v.* Stewart (see § 57), also held that a combination to prevent an employer from employing non-union men by threats of insult, etc., was a criminal conspiracy.

§ 53. **Union Labels.**—Under the earlier decisions in the United States it was held that a label or trade-mark adopted by a labor union could not be protected by injunction or suit for damages in courts, for the reason that the laborers employing such label, being merely laborers, had no property right in the results of their labor, and consequently suffered no financial injury from the counterfeiting of their trade-mark.[1] To meet these cases the statute has very generally been passed allowing members of trades unions, or labor unions, or associated laborers in any shop or class, to adopt labels or trade-marks to be used solely to designate the products of their own labor, or of the labor of members of their own trades unions or labor unions in alliance with them; and provision is usually made for the registration of such label or trade-mark in the office of the secretary of state, and a penalty imposed for counterfeiting it;[2] and in

[1] Cigar-makers' Union *v.* Conhaim, 40 Minn., 243; Cigar-makers' Union *v.* Brendel, 22 Atl., 912; McVey *v.* Brendel, 144 Pa., 235; Weener *v.* Brayton, 152 Mass., 101. But see contra, Strasser *v.* Moonelis, 108 N. Y., 611; People *v.* Fisher, 50 Hun., 552; Carson *v.* Ury, 39 F. R., 777.

[2] N. H., 1895, 442; Mass., 1895, 462; Me., 1893, 276; Ct., 1893, 162; N. Y., 1895, 206; N. J., 1895, 123; Pa., 1895, 68; O., 1890, p. 141; Ind., 1893, 40; Ill., 1891, p. 202; Mich., 1895, 206; Wis., 1893, 104; 1895, 151; Io., 1892, 36; Minn., 1889, 9; Kan., 1891, 213; S. D., 1890, 153; Md., 1892, 257; Neb., 2083; Del., 1893, 699; Ky., 1894, 46; Cal.

most of the above-mentioned states remedies by injunction or equity process are expressly given the laborers or the labor union against the infringement of their trade-mark or label, or unauthorized use of such trade-mark by other persons.[3] In fact, the Kentucky statute provides that such union labels shall not be assignable at all.

Such statutes are constitutional, and are not class legislation.[4] And it has further been held in Illinois, and denied in Pennsylvania, that a label declaring union-made cigars to "have been made by a first-class workman, a member of . . . an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is not illegal as being immoral or against public policy within the meaning of the law of trade-marks.[5]

§ 54. **Combinations among Employers.**—Just as the common-law illegality of combinations to raise wages affected in the old cases the law of trades unions, so the common-law illegality of

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Pol. C., 3200; Uta., 1894, 46; Ga., 1893, p. 134; Tex., 1895, 81.

[3] Pa., Minn., Ky., Cal., S. D., Uta., Wis., Tex.

[4] Cohn *v.* People, 37 N. E., 60; State *v.* Bishop, 31 S. W., 9.

[5] Cohn *v.* People, and Cigar-makers' Union *v.* Brendle, above. Browne on Trade-marks, § 602.

combinations in restraint of trade affected that of employers' unions. In neither case does this illegality now generally survive, except in so far as in the latter it is preserved by express statutes like the Anti-Trust act; and in the former it has been expressly done away with by statute in England. (See §§ 51, 55, and 57, and for the result of the United States law against Trusts, see § 66.)

Thus, in an anonymous case [1] decided in 1698, an indictment was sustained against several bucket-makers for combining by covenants not to sell under a set rate; the chief justice (Holt) declaring "it is fit that all confederacies by those of a trade to raise their rates should be suppressed;" and there can be little doubt that the conspiracy to raise the price of an article was illegal at common law. And we find this doctrine still surviving as late as 1855, when the English court of Queen's Bench held that a bond signed by eighteen employers to conduct their business as to rates of wages and times of work, etc., in conformity with a resolution of a majority of them, was null and void at common law, as being a combination in restraint of trade.[2] But all such combinations, both by employers and employees, have in England been legalized

[1] 12 Mod. R., 248.

[2] Hilton *v.* Eckersley, 6 El. & Bl., 47.

by statute; and in this country the law to-day probably is that any combination, short of an attempt to create a monopoly in a necessity of life, which is entered into by employers merely for their own protection or to secure a larger share of the business, is not an unlawful conspiracy, unless it amounts to an actual boycott of some person or persons, or to an infringement of the anti-trust law of 1890, or similar anti-trust laws in the several states.[3] These anti-trust laws have been adopted in more than half the states, and are generally aimed against the combination of dealers or manufacturers to fix the prices of a commodity, or to limit the output, not to fix the rates of labor. Indeed, all labor combinations are in some states expressly excepted from the restrictions of the anti-trust act;[4] and so, in others, combinations of farmers or agricultural or live stock producers.[5] It is a curious fact that while the tendency of our laws is more and more to legalize combinations among employees and the laboring class, or even among farmers and the agricultural class, there has, at the same time, grown up this vast body of legislation prohibiting the corresponding combina-

[3] Dueber Watch Case Co. *v.* Howard Watch Co., 66 F. R., 637. Mogul S.S. Co. *v.* Macgregor, 66 L. T., 1.

[4] Wis., 1893, 219, 9; Tex., 1895, 83, 12.

[5] Tex., *ib.;* Mich., 1889, 225. See, for the anti-trust laws up to 1893, Stimson's Am. Stat. Law, Vol. II., §§ 9900–9905.

tion on the part of the employer or producer. Most of these statutes are, however, ineffectual for one reason or another. For instance, the last one, passed in Missouri,[6] which superseded the previous existing statute of 1891, makes it illegal for any corporation or individual to become a member of any pool, trust, agreement, combination, federation, or understanding with any other corporation or individual to fix the price of any article or product, etc. Now, while it might possibly be conceded to be in accordance with common law principles to prohibit any actual pools by which the price or output was limited to a certain amount, and the profits divided, such a combination being in restraint of trade, and while perhaps even it might be deemed unlawful at common law to make a combination not to sell any product or more than a certain amount of any product, or not to sell for a long period of time, except at a certain price, it is hard to see any constitutional justification for forbidding two or three individual dealers to come to any understanding among themselves as to what, at least for a certain period of time, they shall charge for their commodities. Such statutes are against general constitutional principles, if not against express provision of our state or federal consti-

[6] Mo., 1895, p. 237.

tutions. Owing to the great difficulty of enforcing such laws, and procuring the necessary evidence, there has been little authoritative determination of their constitutionality as yet in the courts. Then, coming to an agreement among employers to pay a certain price for labor: It is hard to see why this should be considered illegal, if the whole authority of American judicial decision is to make similar combinations on the part of laborers or employees perfectly legal. Such statutes may be constitutional, but they are hardly fair. However, as we have said, the ordinary statute against trusts does not cover this point, and consequently they are not cited in this handbook. (See Stimson's "American Statute Law," Vol. II., pp. 580–590.)

The case of *More v. Bennett*, fully discussed in § 51 above, is direct authority that a combination of employees, and consequently of employers, to fix wages and impose penalties on its own members for working for less, is illegal. We have stated at great length in §§ 51 and 55 our opinion that the modern law is otherwise, and that combinations, either of employers or employees, to fix wages, etc., in the absence of any illegal act or of any combination otherwise unlawful—such as a boycott—are perfectly legal.[7]

[7] See Bohn Mfg. Co. *v.* Hollis, 55 N. W., 1119; § 57 below.

Partly as a consequence of the modern prejudice against trusts or combinations of producers, however, there are a great many recent cases which drastically enforce the old common law doctrine against combinations in restraint of trade, and make any combination, agreement, or association of producers or wholesale dealers to fix prices unlawful; such as combinations to fix the price of milk, sugar, coal, lumber, salt, matches, sheep, whiskey, or other necessaries of life, and refusing to allow parties to the combination to enforce penalties provided by the by-laws for under-selling.

Thus in *Commonwealth v. Tack* (1 Brewster, 511), decided in 1868, the defendant was indicted for a conspiracy to stimulate the price of oil. The fact was that the prosecutor, one James O'Connor, having been advised by the defendants that oil would go lower and that he had better "go short," entered into contracts with Tack Bros. & Co. for the delivery of 16,000 barrels of oil, whereby he lost large sums of money; and he procured the indictment of Tack Bros. on the charge of combining to raise the price. The case is, in fact, a curious survival of the old English statutes against forestalling, and probably would not have been possible but for the allegation of conspiracy. The court charged that an agreement between two or more persons to forestall and control the market for

any necessary of life by the employment of falsehood, and "an unmixed motive of mischief either to the public or an individual," was indictable as a conspiracy; but the jury disagreed.

As good an example of such cases as any is perhaps the case of the *Texas Standard Cotton Oil Co. v. Adoue*,[8] and also *Morris Run Coal Co. v. Barclay Coal Co.*,[9] the former being a case where plaintiffs, representing four cotton-seed mills, combined with defendants representing a large number of other mills, all being dealers in cotton seed and manufacturers of products therefrom, for the purpose of having defendants take the entire yield of their mills, they guaranteeing the plaintiffs a certain profit, establishing prices to be paid for seed cotton, to be changed only by agreement, and the minimum price at which all meal cake, etc., should be sold; and that the plaintiffs should not purchase or ship any seed from a certain place. The court refused to sustain an action by the plaintiffs to recover the net profits under the guaranty, on the ground that the contract was void at common law as being in restraint of trade. In the latter case, five coal companies in Pennsylvania entered into an agreement in New York to di-

[8] 19 S. W. Rep., 274.
[9] 68 Pa. St., 173.

vide two coal regions of which they had control, to appoint a general agent who should receive the coal mined from both companies, each in a certain proportion, with a committee to adjust prices, freight rates, etc., and providing for settlements between the several companies every month. The court refused to enforce this contract also, in a suit brought by one of the companies against the others. In this case there was a New York statute, but the decision would probably have been the same without it.[10] In fact these modern anti-trust acts, so far as they can be brought under the most stringent provisions of the common law, are unnecessary; because the courts in their present temper would commonly come to the same conclusion without them; while in cases where the statutes them-

[10] See also the Sugar Trust Case, 121 N. Y., 582; State *v.* Neb. Distilling Co., 29 Neb., 700; Diamond Match Case, Richardson *v.* Buhl, 77 Mich., 632; Salt Co. *v.* Guthrie, 35 O. State, 666; People *v.* Sheldon, 139 N. Y., 251; Phœnix Bridge Co. *v.* Keystone Co., 142 N. Y., 425; Wells *v.* McGeoch, 71 Wis., 196; People *v.* Milk Exchange, 27 L. R. A., 437; Ford *v.* Chicago Milk Association, 39 N. E., 651; Judd *v.* Harrington, 139 N. Y., 105. Such pools, etc., are illegal although the public be not in fact injured: Judd *v.* Harrington. A pool not to sell beer to outsiders for less than $9 a barrel was refused enforcement by a court of equity: Nester *v.* Continental Brewing Co., 161 Pa. St., 473. But sales by a member of such a trust may be sued upon: Nat. Distilling Co. *v.* Cream City Co., 86 Wis., 352.

selves depart from the common law, the courts have usually found a reason for not enforcing them. It is difficult for a southwestern legislature to improve upon the common law in its first attempt.

CHAPTER VIII

STRIKES AND BOYCOTTS

§ 55. **Strikes.**—In the first chapter we discussed the termination of employment contracts, or the quitting of work by employees individually, and also the legality of efforts by way of persuasion or intimidation to bring others to quit employment. We now come to the much more complex question of the legality of concerted efforts to bring about such results. There is no subject connected with labor law about which there has been so much disagreement among judges and jurists, and about which there is still so much doubt. A recent text-book upon strikes and boycotts goes so far as to say that there can be no such thing as a legal strike. The truth is probably the exact opposite. Instead of saying no strikes are legal, we should now say all strikes are legal; that is, all plain and simple combinations to quit work when there is no breach of a definite time-contract in so doing, and where it is not complicated with any element of boycotting, or marked by any disorder or intimidation. When these latter exist, it is the boycotting, disorder, or intimidation that is

illegal, and may be punished or prevented by injunction; not the strike.

The notion that mere strikes are illegal is based entirely upon old English cases, which were followed perhaps, to some extent, in this country early in the present century, but which our courts have now ceased to follow, and the doctrine of which has long since been abrogated in England by express statute. We showed in Chapter I. how the mere quitting of work by an individual is never criminal, nor even gives the employer any action for civil damage, unless there is a breach of a definite time-contract; and it is only the old-established English common law concerning conspiracy which made the matter different in case of a combination to leave, or strike. This doctrine was, and is, except when modified by recent statutes in labor cases, *that an unlawful conspiracy is a combination of two or more persons to accomplish a criminal, unlawful, or immoral purpose by means which may be unlawful or lawful; or a combination to accomplish a lawful purpose by criminal or illegal means* (or perhaps even fraudulent or immoral means[1]), *or for a purpose which could only be*

[1] State *v.* Burnham, 15 N. H., 396, at pp. 401, 402. In Timberly *v.* Childe, 1 Siderfin, 68, decided as early as 1663, it was held that it was an unlawful conspiracy for persons to combine for charging a man with being the father of a bastard child, although that was not a legal offence, but purely

brought about by the use of such means. This law of conspiracy is perfectly definite and well settled, and exists to-day, and the participants in such conspiracy render themselves criminally liable, besides being in all cases liable civilly to the party or persons injured for any actual damage they incur. Now, the word "immoral" in the above definition is very important, and has been construed very broadly. It means substantially not only purposes against morality, such as the seduction of a woman,[2] but things which are contrary to ordinary Christian doctrine,[3] or even the principle of the Golden Rule.[4] Thus, a conspiracy to do financial harm to a

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a moral one; and to the same effect in the case of Queen *v.* Best, 1 Salk., 174, the indictment was for conspiracy to make the same charge. The court said "the conspiracy is the gist of the indictment, and that, tho' nothing be done in prosecution of it, is a complete and consummate offence of itself; and whether the conspiracy be to charge a temporal or ecclesiastical offence on an innocent person, it is the same thing." And in the case of the indictment of Lord Grey and others for combining to seduce a young woman under eighteen, decided in 1682, the indictment was sustained, and the defence were found guilty, although it appeared that the young woman was willing, so there was no criminal offence. 9 Howell's State Trials, 127.

[2] Smith *v.* People, 25 Ill., 17.

[3] Hawkins, in his "Pleas of the Crown" (Vol. II., p. 121), states that a conspiracy wrongfully to prejudice a third person is highly criminal at the common law. And see Reg. *v.* Best, 1 Salk., 174.

[4] State *v.* Buchanan, 5 Harris and Johnson (Md.), 317.

definite person, or class of persons, is an unlawful conspiracy, within the meaning of the definition.[5] So a conspiracy to accomplish a thing against the general welfare of the state, such as suppression of records, or the destruction of boundaries, the bringing about of legislation by improper means, or the manufacture of evidence.[6] The court seems to have held in the Spies case, of the Chicago anarchists, that an association of anarchists was in itself a criminal conspiracy, because its object is the subversion of all laws.[7] It is easy to see why a combination to do a thing harmful to the state may be punished by the state, but it is harder at first to see why a combination merely to injure a person's success or prosperity, such as a combination to hiss an actor,[8] or not to pay rent,[9] should also

[5] Thus, in Rex *v.* Cope, 1 Strange, 144, a husband and wife and their servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was a card-maker, by putting grease in the paste for his cards. In Baughmann's case (see 11 Va. L. T., 324) defendants, members of trades unions, were indicted for conspiring to injure the plaintiff's business by threatening to break up the business of third parties if they purchased goods of the plaintiff. See also People *v.* Petheram, 64 Mich., 252; Rex *v.* Eccles, 3 Doug., 337.

[6] King *v.* Mawbey, 6 T. R., 619.

[7] Spies *v.* People, 122 Ill., 1.

[8] Gregory *v.* the Duke of Brunswick, 6 Manning & Granger, 205.

[9] *Ex-parte* Dalton, 28 L. R. Irish, 36.

be punished by the state as a criminal offence, when the same acts, when done by any number of individuals without concert of action, would in no sense be criminal, nor perhaps even subject the individuals to damages. One individual may wish another any amount of harm, may seek to injure his business or prosperity in all possible ways, but still, so long as he commits no trespass or battery, and no fraud or theft, he is not liable even civilly, still less criminally.[10] But the law of conspiracy is one of the rare instances where the law goes solely into the intent and purposes of the act. It is the combining with such wrong intent or purpose that makes the participators liable to the criminal law, not the ultimate motive, nor the acts which they do, even though these be criminal in themselves, or though they do no acts whatever. "It is one of the few cases where the law undertakes to punish criminally an unexecuted intent."[11] For instance, a conspiracy to prevent men taking work by assaulting them with weapons would render all the members of it liable to conviction for criminal conspiracy, and besides, those actually com-

[10] Thus the Calcutta Marine Superintendent ordered all his pilots not to employ a certain tug, and was held not liable in damages to the owner of the tug. Rogers *v.* Dutt, 13 Moore P. C., 209.

[11] Queen *v.* Best, 1 Salk., 174; U. S. *v.* Cassidy, 67 F. R., 705; Baughmann's Case, 11 Va. L. J., 324.

mitting the assaults would also be liable for criminal assault and battery; and all the members of the combination might be so guilty of conspiracy, although no actual assault were committed,[12] provided that was the agreed method of carrying out the conspiracy; or in cases where it was necessarily and obviously the only method by which the result could be attained. So, under the first branch of the definition as above expressed, a combination to drive A B out of business in a certain town is a criminal conspiracy, though the means employed are merely legal combination;[13] but a combination by other merchants in the town to get all the business in the town would not be a criminal conspiracy, even though the things done in both cases were precisely the same, and as a result

[12] King *v.* Eccles, 3 Douglas, 337 (see next note); King *v.* Gill, 2 B. & Ald., 204; Poulterer's Case, 9 Coke, 55 B.

[13] King *v.* Eccles, 3 Douglas, 337. This was a case where an indictment was sustained charging that the defendants conspired "by indirect means" to impoverish the prosecutor by depriving and hindering him from following his trade of a tailor in Liverpool, and it was held unnecessary to set forth in the indictment any particular acts which were done, that being mere matter of evidence. So, in an early New York case of sailors' boarding-house keepers, indicted for combining not to ship men through a certain notary, the court held that a combination to do or not to do an act which, if done or not done respectively, would injure an individual in person, property, or reputation, was a criminal conspiracy. Emanuel's Case, 6 C. H. Rec., 33.

A B in both cases was driven out of business.[14]

This, I think, will be found to be the ultimate test of the unlawful conspiracy. The law here goes into the domain of conscience and morals. The question is not so much what is done, nor even what results follow, but what is the inmost real intent of the persons engaged in doing it.

Under the statute of Elizabeth wages were at least pretended to be fixed by law, or by a machinery of magistrates, etc., provided by statute. A combination to raise the rate of wages, therefore, became technically illegal, and upon this ground the leading and oldest case, that of the Journeymen Tailors, was probably decided and can only be maintained. (See below.) And besides these statutes regulating wages, we must note that there was also in existence a statute (the second and third of Edward VI.), passed in 1548, forbidding "all conspiracies and covenants of workmen not to make or do their work but at a certain rate or price," the third conviction under this statute being punishable by the pillory and the loss of an ear. This statute was not expressly repealed until the present century, and there were divers other statutes passed in the seventeenth and eighteenth centuries regulating

[14] Mogul S. S. Co. *v.* McGregor, L. R., 23 Q. B. D., 598.

wages,[15] and in 1717 Hawkins published his "Pleas of the Crown," which is usually quoted as the leading authority for the principle above stated, "that there can be no doubt but that all conspiracies whatsoever wrongfully to prejudice a third person are highly criminal at common law." (2 P. C., 121.) And Chitty adds the words "whether the intention is to injure his property, his person, or his character." (3 Crim. L., 1139.)

Upon this state of the law and statutes the Journeymen Tailors case [16] arose. Certain journeymen tailors of the town of Cambridge were indicted for a conspiracy among themselves to raise their wages by refusing to work at so much per diem. The defence was that the statute of Elizabeth did not require them to work by the day, but by the year, and therefore no crime appeared upon the face of the indictment. The court held that it was not for the refusing to work, but for the conspiracy, that they were indicted, and that a conspiracy of any kind is illegal, though the matter about which they conspired might be lawful for one of them, or any of them, to do if they had not conspired to do it; "and this appeared in the case of the Tubwomen *v.* the Brewers of London." This

[15] See, for discussion of these laws, Master Stevedore's Association *v.* Walsh, 2 Daly (N. Y.), 1.

[16] 8 Mod., 11.

case of the Tubwomen is somewhat mythical, but is believed to be the case of the King *v.* Starling, 1 Keble, 650, in which certain brewers were indicted for conspiracy to cease making small beer, and thus incite a riot, and deprive the king of his excise. It has, therefore, no bearing on the question of a strike, but is an authority for the proposition above advanced that a legal combination by lawful means to effect a thing injurious to the state is a criminal conspiracy. On this Journeymen Tailors case alone hangs all the law of the illegality of a strike as strike, and it will be seen that the case itself only goes to the length of so holding when the object of the strike is to raise wages, which may frequently not be the case. Yet its doctrine persisted in England as late as the case of Hilton *v.* Eckersly (see § 54) and Farrer *v.* Close [17] (1869), where the court were divided whether a labor union, part of whose by-laws countenanced strikes, was not thereby rendered wholly illegal.

But in this country, wages never having been fixed by law, the case should never have been followed. It was followed in three early cases, happening respectively in Philadelphia, in 1806, in New York, in 1809, and in Pittsburg, in 1815; [18]

[17] L. R., 4 Q. B., 602, at p. 612.

[18] The Boot and Shoemakers of Philadelphia, pamphlet, 1806; Journeymen Cordwainers of New York (People *v.*

all decided, however, in inferior courts. The first supreme court which had to treat the subject was that of Pennsylvania.[19] This case was not, indeed, decisive of the exact point, because instead of being a combination of employees to raise wages, it was a combination of employers to reduce them ; but the court held incidentally, apparently without knowledge of the Merchant Tailors case, that it had never been decided in England that it was unlawful for either side to make combinations not to work, or not to employ below or above certain wages. It is probable that in England the combination of employers to pay not more than the rate of wages legally prescribed would not have been held a criminal conspiracy. But finally, Judge Daly, of the New York court of Common Pleas, in the first really well-argued and exhaustive decision on the subject,[20] decided in 1867, affirmed the principle of Commonwealth *v.* Carlisle, and denied the authority of the Merchant Tailors case at least in this country, although to Judge Shaw, of Massachusetts, and Mr. Rantoul, of Salem, belong the chief credit of preventing the doctrine of the Merchant Tailors case from being established in this country. In

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Melvin), 2 Wheel. Crim. C., 262 ; Pittsburgh Cordwainers, pamphlet, 1816.

[19] Com. *v.* Carlisle (1821), Brightly's Rep., 36.

[20] Master Stevedores *v.* Walsh, 2 Daly, 1.

the case of the Commonwealth *v.* Hunt,[21] decided in 1842, argued by Rantoul, Shaw first clearly expressed the view above set forth.[22]

This view, that it is lawful for a laborer, or any number of laborers, to leave his work at any time, or to combine to leave at any time for any lawful purpose, such as the raising his own wages, or the bettering his own condition in other respects, would probably have never more been disputed in this country but for the extraordinary statutes known as the Interstate Commerce Act and the Anti-Trust Act, passed in 1887 and 1890, respectively, and for the American practice of putting railroads and other corporations when insolvent in the hands and under the active management of courts of equity. We shall have occasion to discuss much more fully the effects of this practice, and of these statutes, in a later section. It will be sufficient to say here that the effect of the Interstate Commerce Act was to make any combination of persons, for any purpose which had the necessary or intended effect of interfering with interstate transportation, an unlawful conspiracy; an effect which was confirmed by the later sections of the Anti-Trust Act, which, moreover, provided expressly that the United States through its district attorneys should go into

[21] 15, 4 Met., 111.

[22] See also People *v.* Trequier; 1 Wheeler Cr. C., 142.

courts of equity and obtain injunctions against such persons, and expressly defined a new sort of conspiracy which, though the statute was aimed at combinations of employers, equally covers combinations of employees or other persons, and has in practice worked mainly against them.

Thus in Thomas *v.* Cincinnati, N. O. and T. P. R., 62 F. R., 303, the court held that it was an unlawful conspiracy at common law for employees of a railroad to strike with the motive of retarding mails, under section 3995 U. S. Rev. Stats., and affirmed the principle that any unlawful interference with the operation of a road in the hands of a receiver is a contempt of court.[23]

Strikes by Persons under Contract.—We conclude, therefore, that at least except in cases where a strike is specially and primarily aimed at interfering with interstate commerce, it is perfectly legal, or gives rise to no criminal nor civil liability, and may not be prohibited by injunction. Now, is the matter made different when the person striking commits in so doing a breach of an express contract; or, still more, when the defendants are members of a combination to induce others to strike who are working under a

[23] See also U. S. *v.* Kane, 23 F. R., 748; In re Doolittle, 23 F. R., 544; In re Higgins, 27 F. R., 443; Secor *v.* R. R. Co., 7 Biss., 513.

time contract? It cannot be stated that the law is definitely settled on this point. It has not yet been fully considered. Under the definition of conspiracy given above, the breaking of a contract, if not illegal, is at least an immoral act, and a conspiracy to obtain persons to break their contracts is certainly a conspiracy having for its object the injury of a third person. The nearest recent case to the subject is that of Queen *v.* Bunn,[21] where it was held that servants of a gas company working under a contract of service, who agreed together to quit the service of their employers without notice, and in breach of their contracts, were guilty of conspiracy under the common law, and might be enjoined; but the case is not a clear authority on the point for two reasons: first, that it appeared the object of the conspiracy was to force the company against its will to employ a man it objected to employ, and the breaking of their contracts to labor by the defendants was the means employed and not the end; secondly, because in England, under the Masters and Servants Act of 1867, the breaking of a contract of employment by servants, factory employees, etc., was made a penal offence. The employer could complain to a magistrate, who

[21] 12 Cox C. C., 316. The court expressly overruled this case with Reg. *v.* Druit, in Gibson *v.* Lawson: 17 Cox C. C., 354; but the new statute of 1875 (see below) was quite sufficient ground for the decision; the rest was but a dictum.

was given by the statute authority to direct fulfilment of the contract of service under penalty of fine or imprisonment. Now, in this country, with the exception of the few southern states whose statutes to the contrary effect were cited in § 49, it is not criminal or penal to break a contract. Therefore it is possible that the doctrine of this case would not apply in the United States.[25] It is noteworthy, however, that Judge Oliver W. Holmes, of the Supreme Court of Massachusetts, in rendering a most important decision when refusing an injunction against certain employees from refusing to work and persuading others not to work, expressly noted that the employees were not under any time contract, were therefore at liberty to cease work at any time, and were therefore not, in combining to persuade others not to go on working, seeking to have them break an express contract with the plaintiff. It was implied in Judge Holmes's decision that the conspiracy or combination might have been unlawful if such had been the case.[26]

There is a recent English statute, passed in 1875, concerning conspiracy, which declares that an agreement or combination of two or more persons to do or procure to be done any act in

[25] But see Angle *v.* Ry. Co., 151 U. S., 1 ; Arthur *v.* Oakes, 63 F. R., 310.

[26] This case is unreported, but can be found in full in the Massachusetts Labor Annual for 1895.

contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. With the exception of Maryland,[27] this act has not been copied in any of the United States. Of course these provisions are conclusive, and undoubtedly do away with the whole common law of conspiracy in labor disputes;[28] and it is probable that the labor interests will make strong efforts during the next few years to secure their general adoption in this country; but until such a statute has been passed changing the common law, we can only conclude that a conspiracy of persons, whether employed or not, to induce each other, or to induce third persons, to cease labor, when such ceasing would be a definite breach of contract, is an unlawful conspiracy at the common law; probably subjecting participators in it to criminal process, and certainly making them liable in damages to the employer injured, and a proper case for an injunction from a court of equity.

Sympathetic Strikes, or Strikes aimed primarily at the injury of the employer or other persons.—If the reader will carefully follow our line of reasoning at the beginning of this sec-

[27] See § 59 for this and similar statutes.

[28] So held in Gibson *v.* Lawson and Curran *v.* Treleaven, 17 Cox C. C., 354.

tion, he will see that, while employees have a legal right to strike for their own benefit, to raise their own wages, or seek improved conditions of employment, there will still be a question whether they have a right to strike for no such direct purpose, but merely out of malice against the employer, or still more as a simple act of industrial warfare for the purpose of inducing some employer not their own, or the general class of employers, to yield to the demands of some other person or persons, or of some different strike. A strike of this sort partakes at once more of the nature of the boycott than of the strike, inasmuch as it is a conspiracy to do certain acts (that is to strike) not for the purpose of raising the strikers' wages, etc., but to oppress or injure the business of another person. There is a case in Nebraska, which goes very far toward holding that the combining to leave work in such a way as to maliciously injure the employer, even with the motive of a personal interest or a demand of the strikers, is an unlawful conspiracy; and the Debs case, and the similar recent cases arising at the time of the Pullman strike, are full of authority on the proposition that any sympathetic strike is illegal. The history of the case involving the Northern Pacific Railroad strike is also very instructive on this point, and particularly the manner in which the injunction was finally

amended by the decision of the Court of Appeals. In the Nebraska case,[29] eighteen tailors agreed to strike on a certain March 31st, and to return all jobs unfinished that had been given out to them after the cloth was cut out. It does not appear that they were under contract to work for a definite time, but the court seems to have held that it did appear that the object of a strike in that manner must be the malicious injury of the employer, and he was given damages against them. This case, therefore, can only be sustained under the moral distinction that we have endeavored to make clear in this section, namely, that although the ceasing to work was legal in itself, or even the combining to cease from work, yet it became illegal when the object of such legal actions was a definite injury to the plaintiff. In the Northern Pacific Railroad case,[30] the facts were a general strike among the employees of a railroad in the hands of a receiver appointed by the United States court. The receiver, Oakes, secured an injunction against Arthur and many others, not prohibiting the employees from quitting work, but prohibiting them from so *combining* to quit work *as to cripple the employers' business*—the employers' business being in part interstate transporta-

[29] Mapstrick *v.* Ramge, 9 Neb., 390.

[30] Arthur *v.* Oakes, 63 F. R., 310, 317, 321; Farmers' Trust Co. *v.* N. P. R. R., 60 F. R., 803.

tion. It is impossible to say how far this fact, and that the receiver was an officer of the court, influenced the court in rendering its decision, and whether it would have granted the same injunction in a case where there was no interstate question, and no possible contempt of a court officer involved. It is possible, however, that the decision would have been the same; that is, that while a strike is legal, it cannot be so conducted as to intentionally, maliciously injure the employer. The amendment of the injunction by the Circuit Court of Appeals is very instructive. The first injunction prohibited the defendants from intimidating others (which was proper enough), and also even from advising others to strike. By the Circuit Court of Appeals the last clause of the injunction was stricken out, and the employees were left free both to leave employment themselves and advise others to leave, provided they used no intimidation and did not maliciously seek in so doing to cripple the employers' business.

Of course the whole difficulty will lie here. Employees having an undoubted right to strike, it will in many cases be impossible to tell whether they strike simply for the purpose of increasing their own wages (which the court decision expressly authorized), or whether they strike in order to injure the employer. All strikes injure the employer somewhat, and em-

ployees will naturally and very properly choose a time when press of business or other reasons make a strike peculiarly inconvenient to the employer. In the writer's opinion, this doctrine of malicious intent should, in the case of strikes, be very carefully restricted; where it is clear that the strikers did have a legitimate object at all, such as the increasing their own wages, it does not seem the court should go into the analysis of possible other motives. In the case of boycotts it is otherwise.

But the most difficult case of all to decide is that of a strike carried on by employees with a motive of benefiting themselves in some way, but where the immediate object is to force the employer to adopt some definite line of action, either toward them or in the conduct of his own business, or toward third persons. In the first case, when the object desired is merely to alter his treatment of the striking employees themselves, it is clear that the object is a benefit to them, or deemed by them to be a benefit, and it is consequently lawful. The second case is more doubtful. If there be no element of a boycott in the case, but still the strikers desire to molest the employer or control his action in some way, the end in view is, under the decision in State *v.* Stewart (see § 58), unlawful. Take, for instance, the case of a conspiracy to strike unless the employer manufactured one kind of

goods rather than another. Here there is no element of injury to third persons, and it would seem, perhaps, hard to say that the employees might not agree to leave their employment in a kind of work which they did not prefer. As the law now stands, however, we have to call such a strike a combination technically unlawful, though it may be doubted whether an American court would ever go so far in an actual case. But the third case, where the strikers seek to control the employer in his action concerning third persons, and to their injury, presents no doubt. The best possible illustration of this is a strike against an employer to force him not to employ non-union men. There can be no doubt that in the absence of statutes such as have been recently passed in England, such a strike, if evidenced by any letter or communication threatening the employer with the strike in case he did not cease to employ non-union men, would be a criminal conspiracy.[31] Of course, if the strikers simply left, without making any threat or giving any reason, it might be impossible to get evidence that such was their object. The threat of a strike may well be unlawful when the strike itself is not.

On the other hand, laborers may justly refuse to work with persons who have not been duly

[31] See § 52, Notes 5 and 7.

educated and brought up to the trade; and are not subject to indictment for conspiring to do so, or even to damages at suit of the person so discriminated against. They may strike against such persons, although not, say the court, merely "to make others conform to their peculiar views." [32]

Conspiracies to Persuade Others to Strike.—It will be seen from the above line of argument that where a combination is made, not by employees with a grievance, but by other parties, to persuade employees to strike, it partakes more of the nature of a boycott, and may therefore become a criminal or unlawful conspiracy. This matter will be fully discussed in §§ 57–59; but it has frequently been held that a combination of persons to procure employees to strike to the injury of their employer's business is a criminal conspiracy or such an unlawful conspiracy as will give the employer a right to damages and an injunction against the persons in the combination. And this is probably law to-day as to such persons as are not themselves striking employees.[33]

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[32] Denny's Case, Lewis Crim. Law, 625.

[33] See Walker *v.* Cronin, 107 Mass., 555; Sherry *v.* Perkins, 147 Mass., 212; Thomas *v.* R. R. Co. re Phelan, 62 F. R., 803; Pettibone *v.* U. S., 148 U. S., 197.

Contra, Johnson Harvester Co. *v.* Meinhardt, 60 How. Pr., 168, where an injunction was refused against members of a

But as in England by statute, so here the tendency of the courts is to refuse to consider as unlawful a combination of persons, though not employees of the plaintiff, which merely seeks to persuade these to leave work, if not in breach of any definite contract; at least when such action is motived by some general labor dispute and not expressly or solely in order to injure the plaintiff. There are plenty of decisions the other way beside those quoted above;[34] but the

labor union not employees of the plaintiff, from persuading these latter to strike.

In Arthur *v.* Oakes, 63 F. R., 310, the injunction was refused against defendants from persuading others to strike, except as to striking in such a manner as to cripple the plaintiff's business.

In Com. *v.* Sheriff, 38 Leg. Int., 412, it was held that under the Pennsylvania statute (see below) members of a trade union who engage in a strike and notify other members, although in other factories, to strike, and although defendants are not employees of the plaintiff, are not guilty of criminal conspiracy in the absence of force or intimidation.

And this was followed by Newman *v.* Commonwealth, 34 P. L. J., 313, which made the same interpretation of the Pennsylvania statute, but held that certain of the facts here showed intimidation, such as the presence of men with firearms and large bands of music, arriving at night and waking the employees, all attended with some destruction of property. So in Wick China Co. *v.* Brown (in 1894), 30 Atl., 261, an injunction was granted against members of a labor union in New Jersey from combining to prevent by force, threats, following, or ridicule the plaintiff's employees from working.

[34] Thus in Carew *v.* Rutherford, 106 Mass., 1, damages were awarded a stone-cutter whose workmen were persuaded

writer ventures to predict that such will be the ultimate position of American courts on this point, in the absence of any complication of a receivership or federal statute. (See §§ 65, 66.)

Statutes Relating to Strikes. –In England, by Chapter 31 of 34 and 35 Victoria, "the purposes of any trade union shall not by reason merely that they are in restraint of trade be deemed unlawful so as to render any member liable to criminal prosecution for conspiracy or otherwise." It was held in the case of Queen *v.* Bunn, above discussed, that this statute did not in other respects affect the old common law of conspiracy, but only applied to combinations for purposes in restraint of trade. Accordingly the act of 1875 (38 and 39 Vict., C. 86) was passed declaring that "any agreement or combination of two or more persons to do or procure to be done any act in contemplation or further-

to leave for the purpose of forcing him to pay a fine levied by the labor association for employing non-union men. In Commonwealth *v.* Curran (1869), 3 Pittsburgh Rep., 143, the defendant was convicted for conspiring to force the plaintiff to employ the defendant himself in his colliery by causing the other workmen to strike or leave work; an exceptional state of facts which makes the case a peculiarly interesting one. The motive of benefit to the defendant was here most clear; logically, therefore, the case would now be wrong; and yet it is certain that such combinations to control the action of another to one's so evidently selfish interest can hardly be permitted.

ance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." [35] This statute is

[35] "The Conspiracy and Protection of Property Act, 1875."

§ 3. "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. . . . Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the state or the sovereign. . . . A crime for the purpose of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction. . . . Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person. . . .

§ 5. "Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall . . . be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

§ 7. "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other

very sweeping, and would almost seem to do away with the law of conspiracy in trade disputes. Nevertheless the act appears ambiguous in one particular: suppose a conspiracy not to perform some definite act, but to ruin the trade of a person with whom the strikers are at enmity. Such a conspiracy would undoubtedly

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person has a legal right to do or abstain from doing, wrongfully and without legal authority—

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
2. Persistently follows such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

be unlawful at common law, and still does not appear to be covered by the words of the statute. Mr. Gladstone in a speech of December 10, 1891, at the opening of the National Liberal Federation Conference, urged the total abolition of the common law against conspiracy and stated: "Nothing must be a crime which relates to the prosecution of labor interests, or because it is done by a combination of men, unless it is an offence against the letter and spirit of the law." And this is a correct statement of the tendency of legislation in England. In this country the legislatures have not gone so far. In Maryland alone has the English statute been precisely copied in the following words (Art. 27, § 31): "An agreement or combination by two or more persons, to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act, committed by one person, would not be punishable as an offence; nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or any offence against any person or against property."

But in Montana, also Minnesota (6423), the law of criminal conspiracy is strictly limited by statute (see § 58), the common law of the subject repealed, and it is further expressly enacted in Montana that its provisions shall "not apply

to any arrangement, agreement or combination between laborers made with the object of lessening their hours of work or increasing wages, nor to persons engaged in agriculture or horticulture with a view of embracing the price of their products." (Mon. P. C., 325.)

So in Minnesota and Oklahoma, the common law of conspiracy appears to be repealed; and even in the conspiracies still recognized by statute some overt act is necessary. (Minn., 6425; Okla., 1893, 2063.)

The New York statute rather implies that certain strikes may be illegal;[36] and for other similar statutes, see § 58, notes.

[36] "A person who wilfully and maliciously, either alone or in combination with others, breaks a contract of service or hiring, knowing or having reasonable cause to believe that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanor, . . . but nothing in this code contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered." N. Y. P. C., 673, 675.

In Pennsylvania any laborers or employees acting either as individuals or as members of any union may refuse to work for any person whenever in their opinion the wages paid are insufficient or the treatment unjust or offensive, or the continued labor by them would be contrary to the rules of any union, etc., without subjecting such persons to prosecution for criminal conspiracy: Provided that this shall not prevent the

§ 56. **Lockouts.**—A lockout is the general discharge of his laborers by an employer, and is consequently the opposite of a strike. As lockouts are of rare occurrence, being commonly provoked only by strikes, and as they are not attended with disorder, intimidation or other objectionable and usual consequences, there are very few cases on the subject and no statutes. Of course an employer hiring his laborers for no definite time has an absolute right to discharge them at any time without notice in the same manner that the laborers have a right to leave. (For statutes requiring mutual notice, etc., see § 22 above.) The only point on which the law concerning lockouts needs discussion is whether a combination of employers to lockout, or a sympathetic lockout, having for its object the injury of the employees of one or more of them, would be an unlawful conspiracy. If sympathetic strikes are held to be unlawful, the same rule should doubtless be applied to lockouts. There is no such combination, as a rule, among employers in labor disputes as there is among employees; being in competition with each other, they are commonly ready enough to profit by

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prosecution under any law other than conspiracy of any person who shall by the use of force, threats, or menace of harm to person or property hinder persons who desire to labor from so doing, or conspire to commit a felony. Pa. Dig., p. 2019.

a strike directed against one of their number. Nevertheless, if it should happen, the same rule must be applied to employers that is applied to employees. Consequently if the sympathetic strike is held unlawful, the sympathetic lockout is to be held unlawful also.

In the last section we have attempted to set forth the reasons for believing that ultimately the courts will refuse to consider even sympathetic strikes unlawful conspiracies, except when the case is complicated by the peculiar provisions of some statutes like the Anti-Trust law or the Interstate Commerce law. And so, under these there is no doubt that if, in the Chicago strike of 1894, the railroads had combined to discharge all their workmen in order to bring the striking employees to terms, and thereby stop the running of their roads, they would have been liable criminally and to process of injunction in the same manner that the striking employees were liable. In fact this was directly set forth in Judges Woods's and Grosscup's charges to the grand jury.[1]

§ 57. **Boycotting.**—The subject of unlawful conspiracies has been so far discussed already in the sections upon trades unions and strikes (sections 51, 54, 55), that the ground is largely

[1] U. S. *v.* Debs, 64 F. R., 725; 62 F. R., 832.

cleared for a discussion of this difficult subject. The reader will remember the definition of unlawful conspiracies given in § 55, from which it appeared that this is a matter wherein the intent becomes of importance, that a combination primarily to injure a definite person or class of persons is an unlawful conspiracy, though none of the acts committed in carrying it out are unlawful in themselves; still more, of course, when the acts in themselves are unlawful. The prime question in the law of boycott is that of intent. Was the intent primarily to injure another person, to molest him, or to control him in his lawful rights and liberties; or was it a combination, by doing acts which the persons combining had lawful right to do, primarily to better their own condition by getting the employer to alter his conduct in relation to the persons combining themselves? It may be said in the beginning that, just as simple strikes are nearly always lawful, so boycotts are nearly always unlawful. It is difficult to conceive of a boycott conducted solely by lawful acts, and with the sole object of benefiting the persons actually taking part, for the reason that nearly the only lawful act the persons combining can do which has relation to their employers solely, is to refuse to work for him. And this falls at once under the head of strike. So, when they peaceably persuade others not to work for him, and

establish a reasonable patrol or picket about his place of employment in so doing, this falls under the technical head of picketing (see § 60), which is one of the usual adjuncts of a strike. But boycotts, or unlawful conspiracies, commonly entitle persons actually injured to damages; they may be restrained by injunction, and they subject the members thereof to criminal liability, whether any act be done or any injury actually result to the public or not.

The word "boycott" itself is of recent discovery, but the thing has existed from time immemorial.[1] As is well remembered, the word arose from the efforts of certain Irish tenants to exclude Captain Boycott from all intercourse with his neighbors, because he endeavored lawfully to collect his rents, and is thus defined in the later similar case,[2] "threatening to cut off from all social intercourse and connection, intercourse and dealings in the way of business, and to shun as if affected with a loathsome disease and hold up to public hatred and contempt, and to subject to annoyance, injury, and loss in the pursuit of his lawful occupation and industry, any tenant," etc., who would pay his rent. This it will be seen was a conspiracy unlawful under both branches of the definition given in § 55; for it

[1] See below, p. 246, the Abbot of Lilleshall's case.

[2] Reg. *v.* Parnell, 14 Cox C. C., 508.

was both a conspiracy with an unlawful purpose, to wit, to prevent certain third persons from fulfilling a contract, and carried on by unlawful means, to wit, intimidation; but either one of these elements of illegality would have been sufficient.

We use the word "boycott" as meaning exclusively an *unlawful* conspiracy, and it may be well to enumerate some of the combination which have been held as such. Such are:

A combination to compel, by preventing his obtaining employment, a member of a labor union to pay a fine assessed against him for working in a mill where steam machinery was used, against the rules of the society of the defendants known as "The Philanthropic Society of Coopers."[3] In this case the fine could not have been collected at law, so the purpose was illegal, and also the means, which were, generally, intimidation.

A combination to molest or obstruct an employer or other person in the conduct of his business or affairs;[4] and the law is the same although the combination is not by laborers and no labor question is involved. The words "molest" or "obstruct" are the words of the English statute existing at the time which prevented such

[3] Reg. *v.* Hewitt, 5 Cox C. C., 162.

[4] Reg. *v.* Druitt, 10 Cox C. C., 592; People *v.* Petheram, 64 Mich., 252.

combinations, but in this particular the statute merely declares the common law; thus, Lord Bramwell, in deciding the case, speaks as follows: "Having made those general remarks, he would make another, which was also familiar to all Englishmen—namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. . . . But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavored to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those toward whom they so conducted themselves. He was referring

to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon; and he laid it down as clear and undoubted law, that if two or more persons agreed that they would by such means co-operate together against that liberty, they would be guilty of an indictable offence. The public had an interest in the way in which a man disposed of his industry and his capital; and if two or more persons conspired by threats, intimidation, or molestation to deter or influence him in the way in which he should employ his industry, his talents, or his capital, they would be guilty of a criminal offence. That was the common law of the land."

These words of Lord Bramwell's are the best expression of the English law to be found in the cases, and may be well compared with the decision of Judge Taft in the Cincinnati Superior Court, in a recent case which has already been much quoted in this country.[5] In that case it was decided that a combination by a trades union to coerce an employer to conduct his business, with reference to apprentices and the employment of delinquent members of the union, according to the demand of the union, by injuring his business through notices sent to his customers

[5] Moores & Co. *v.* Bricklayers' Union, 23 Wkly. L. B. (O.), 48.

and material men, stating that any dealings with him would be followed by similar measures against them, was an unlawful conspiracy. The judge in the lower court made the following charge :

"The defendant union claims to be an organization composed of journeyman bricklayers, one of whose objects is the bettering of their condition by united action on the subject of wages, and the admission of apprentices into their craft. It becomes necessary to define what action they may legally take to carry out such purposes. They may, by mutual agreement, provide for and impose penalties for the failure of any of their members to comply with such regulations in respect of these purposes as their association makes. They may unite in withdrawing from the employ of any persons whose terms of employment may not be satisfactory to them, or whose actions with regard to apprentices are not to their liking. Beyond this they cannot go, to compel their employers to come to their terms. If, in addition to withdrawing from his employment, they combine together to coerce their employer to come to their terms, and so interfere with his business by frightening persons from selling to him, or buying from him, or contracting with him, by threats of a withdrawal of union workmen from the employment of such persons, *i.e.*, by boycotting him, they become engaged in

an unlawful conspiracy, and are liable to the employers for any injury arising therefrom. . . ." The argument for the defendant was as follows: "A conspiracy is a combination of two or more persons to do an unlawful act or a lawful act by unlawful means. It follows that there is no conspiracy unless, either in its end or in its course, the combination is to do an unlawful act. Every man may dispose of his labor by such contract and to such persons as he pleases. He may refuse to contract with any man or class of men. If he chooses not to work for any person using materials of a certain dealer, that is his right. What he may lawfully do he may lawfully announce his intention of doing. Therefore, he may notify his possible employers of his intention not to work for any man using material of such dealer. As these are acts all within his right and lawful, he may combine with others to do them, and such combination being only to do lawful acts, is not a conspiracy and is not actionable." But Judge Taft in his opinion went on to say: "If this argument is sound, the charge was erroneous. . . . It assumes two propositions: *first*, that no act generally lawful can become unlawful or actionable by reason of the motive or intent with which it is done; and *second*, that nothing which is not actionable when done by one person, can be actionable or unlawful when done by a combination of persons. In

our opinion both of these propositions are erroneous.

"We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer, or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights, the loss which is suffered, is *damnum absque injuria*. . . . .

"But on this common ground of common rights where everyone is lawfully struggling for the mastery, and where losses suffered must be borne, there are losses wilfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice. . . .

"In the exercise of common rights, like the pursuits of a business, or a trade, which result in a mutual interference and loss, such loss is a legal injury, or not, according to the intent with which it has been caused, and the pres-

ence or absence of malice in the person causing it. . . .

"The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired, will not, as we think we have shown, make any legal justification for defendants' acts.

"The discussion up to this point has ignored the element of combination in the acts of the defendants. But such cases can rarely, if ever, arise, because the power of a single individual to put into operation such a chain of causes as are necessary to inflict loss is hardly to be conceived. The combination of individuals to effect such a purpose is generally indispensable to its success. In the Mogul Steamship Company *v.* Macgregor,[6] *supra*, Bowen, Lord Justice, says, 'of the general proposition that certain kinds of conduct, not criminal in any one individual, may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and

[6] L. R. 23, Q. B. D., 598; 66 L. T., 1.

the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights.' In Gregory *v.* Duke of Brunswick,[7] Coltman, J., says, 'It is to be borne in mind that the act of hissing in a public theatre is *prima facie* a lawful act, and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be difficult to infer such a motive from the isolated acts of one person unconnected with others.' It is thus apparent that in determining whether a concerted act, or series of acts, like those at bar, are actionable, the combination is material in two ways: *first*, in giving the act a different character from a similar act of an individual by reason of its greater, more dangerous, and oppressive effect; and *second*, in being strong evidence of the malice with which the act is done."

Another leading case is that of State *v.* Stewart,[8] decided in 1887. This was an indictment for conspiracy against certain persons, granite cutters, but not in the employ of the Ryegate Granite Works, for conspiring to prevent the Ryegate Granite Works from retaining, or taking into its employment, one James O'Rourke and others, also granite cutters, to the damage

[7] 6 Man. and Gr., 953.

[8] 59 Vt., 273.

of the Ryegate Granite Works, and of said O'Rourke and others. The purpose was to coerce the Ryegate Granite Works to conform to the rules of the National Stone Cutters' Union. The method charged was intimidation of O'Rourke and the others, who were then in the employ of the Ryegate Granite Works, by threats that the works would be declared by them to be "scab" works, and that they (O'Rourke and the others) would be published in the *Granite Cutters' Journal* as "scabs." The court said in their opinion: "It is clear to a demonstration that a combination of the character set forth in these counts was a conspiracy at the common law; and, further, that the subject-matter of the offence being the same in this country as in England, namely, an interference with the property rights of third persons, and a restraint upon the lawful prosecution of their industries, as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they please, the common law of England is 'applicable to our local situation and circumstances in this behalf,' and is, therefore, the common law of Vermont. . . .

"Suppose the members of a Bar Association in Caledonia County should combine and declare that the respondents should employ no

attorney, not a member of such association, to assist them in their defence in this case, under the penalty of being dubbed a "scab," and having his name paraded in the public press as unworthy of recognition among his brethren, and himself brought into hatred, envy, and contempt, would the respondents look upon this as an innocent intermeddling with their rights under the law? . . .

"Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable; or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others.

"If they seek to restrain trade, or tend to the destruction of the material prosperity of the country, they work injury to the whole public. . . .

"The principle upon which the cases, English and American, proceed is, that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. . . . And while such conspiracies may give to the individual directly

affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace, and general prosperity of the state are directly involved in the question."

These may be considered the leading modern cases on the boycott, but other instances where the English courts have held that there was a boycott, and granted civil or criminal redress, will be found, arranged for the most part chronologically, in the note.[9]

[9] An indictment was sustained both under the statute of 6 George IV., c. 129, referred to above, and for common law conspiracy, against the defendants, all members of a society called Philanthropic Society of Coopers. One Charles Evans, a member of the society, having done four days' work in a yard where steam machinery was employed, was fined by the society ten pounds under their rules for so doing. He refused to pay; and the other men in the yard then left their work and refused to return while Evans was employed. He was in consequence thrown out of work. Each man who left the yard on account of Evans was paid nine shillings for his loss of time by the society, in accordance with its rules. The court held that these rules were unlawful, and the funds of the society illegally diverted for that purpose; that the fine against Evans was also unlawful, and that the general action of the defendants amounted to an unlawful conspiracy to keep Evans out of work; in other words, what we are now

The English common law of boycotting has been rather limited than extended in recent

calling a boycott, and the defendants were sentenced by Lord Campbell to various terms of imprisonment. Reg. *v.* Hewitt, 5 Cox C. C., 162 (1851).

A combination of workmen to induce other men, although not under contract, to leave their work for the purpose of compelling the master to raise their own wages, as well as a combination to persuade those under contract to leave service, and a combination to induce workmen to leave by making them drunk, by threats, and other unlawful means, was held a criminal conspiracy (Reg. *v.* Duffield, 5 Cox Cr. C., 404). The head-note of this case is a very clear statement of the law, at least as it existed in England during the time the statute 6 George IV. was in force. It is as follows:

"1st. It is a clearly established rule of law that workmen have a right, while they are perfectly free from engagement and have the option of entering into employment or not, to agree among themselves that they will not go into any employment unless they can get a certain rate of wages, and each man, for himself, may say, 'I will not go into any employ unless I can get a certain rate of wages;' and all of them may say, 'we will agree with one another that in our trade, as able-bodied workmen, we will not take employment unless the employers agree to give a certain rate of wages.'

"2d. But workmen have no right to combine together to persuade men already hired by and in the employ of other masters to leave that employment for the purpose of compelling those masters to raise their wages.

"3d. Therefore, a conspiracy to obstruct a manufacturer in carrying on his business by inducing and persuading workmen who had been hired by him to leave his service, in order to force him to raise his rate of wages, or to make an alteration in the mode of conducting and carrying on his trade, is an indictable offence; and an agreement to induce and persuade workmen under contracts of servitude for a

times by statute, so that probably all the cases in the note would be authorities for an Ameri-

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time certain, to absent themselves from such service, is an indictable offence, although no threats or intimidation be proved, or any ulterior object averred.

"4th. Workmen who agree that none of those who make the agreement will go into employment unless for a certain rate of wages, have no right to agree to molest, or intimidate, or annoy other workmen in the same line of business who refuse to enter into the agreement, and who choose to work for employers at a lower rate of wages; and, *semble*, such agreement to molest or intimidate is an indictable conspiracy, as well in relation to workmen willing to be hired and employed, as to those already hired and employed. . . .

"8th. If persons conspire together to take away the workmen of a manufacturer, that constitutes such an obstruction and molestation of him as to support that part of a count which alleges a conspiracy by molesting and obstructing him."

A combination of persons not workmen, but delegates of a trade association, combining to persuade workmen not under contract to leave their employment, and giving money to those who were thus rendered idle to support them, was held a criminal conspiracy. Reg. *v.* Rowlands, 5 Cox C. C., p. 436.

This case grew out of the same transaction as the previous case of Reg. *v.* Duffield, and was decided on the same day. It is noteworthy for the distinction expressly taken between conspiracies by the employees themselves and those of other persons. The prosecutors, Messrs. Perry & Co., tin-plate manufacturers at Wolverhampton, being in a prosperous condition and in harmony with all their workmen, received on the 2d of April a letter from the "National Society of United Trades," announcing that there were dissensions among their workmen, and certain delegates proposed to wait upon them for the purpose of arranging the dissensions which existed between them and their men. Messrs. Perry & Co. were

can court to follow; for, though a few of them rest on the precise words of the recent English

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very much surprised at receiving such a letter, knowing that there had been no complaint with regard to the employment or the rate of remuneration given. They began to make some inquiries, and found that, with the exception of one person, all of the men in their employ had seemed to agree with their masters; but this person (one Preston) was observed to go from bench to bench throughout the workshop and hold communications with the men relative to some secret matters, whereupon Messrs. Perry discharged him. After that they were waited upon by the delegates, who wished to know, in the first instance, why Mr. Preston had been discharged, and informed Messrs. Perry that unless they restored him to work they would take every man out of the manufactory; and further, that they had means of carrying out that object, unless Perry & Co. submitted to the scale of prices which they then proposed. After much negotiation, the delegates were informed that Messrs. Perry would not submit to be controlled by any association whatever, and the strike took place. The court ruled that, while workmen had a right to combine for their own protection and obtain such wages as they chose to agree to demand, other persons not workmen could only combine with them to assist in that purpose in so far as it was a direct benefit to the parties combining; and moreover, that any combination to control a man in the conduct of his business, and threaten him with ruin if he did not abide by conditions, would be a criminal conspiracy. This case also proceeded under the statute of George IV.

A combination of all the colliers in a colliery except seven, sending a letter to their employer that all workmen would strike in fourteen days unless the seven men were discharged, signed "By order of the Board of Directors for the body of coal-miners," was held unlawful under the statute of George IV. Rex. *v.* Bykerdike, 1 Moody and R., 179 (1832).

Perham's case (5 H. & N., 30) was not a case of conspiracy,

statutes, such as "to molest," "to obstruct," or "to persistently follow," the English courts

as it was an indictment under the statute of George IV. against Perham alone, at the prosecution of one of the workmen of Messrs Piper & Son, for saying to him and fifteen other of Messrs. Pipers' workmen, "If you dare work we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London;" but it is interesting as showing that the threat of a strike was held sufficient intimidation under the English statute.

In the same way the case of Wood *v.* Bowron (L. R., 2 Q. B., 21) is instructive. Bowron charged the defendants, two bricklayers, with using threats under the statute to force the respondent to limit the number of his apprentices. The evidence was that all his workmen except two stopped work, they not being under contract, whereupon Bowron wrote to the defendant Barrow, the secretary of the Bricklayers' Union, a letter asking him to inform him what was the reason that his men were taken away. Barrow answered, by order of the society, that it had been voted at a meeting of the order of bricklayers that none of them would work for Bowron until such time as he parted with all but two apprentices. The court held that this was a statement of the reason of the strike contained in an answer to a letter, and consequently not a threat under the statute. This decision has been much criticised, but is interesting as showing the necessary refinement of the law on this point.

The next English case is that of Walsby *v.* Anley (7 Jurist N. S., 465), and this did not depend entirely upon the statute (6 George IV., Chapter 129, § 3), Judge Crompton holding that a combination of workmen to coerce a master to discharge fellow-workmen was illegal at the common law, and such combinations were not specifically allowed by the exceptions set forth in the statute. The facts were that the plaintiff, a builder, had in his employment men working under a "declaration" pledging them not to join in strikes; that the de-

themselves have ruled that this statute but expressed the common law; and those sections of

fendant, one of his workmen, brought to him a paper signed by him and other workmen saying that the plaintiff "be given to understand that unless the men who were working under the declaration be discharged, and we have a definite answer by dinner time to that effect, we cease working immediately." This was held an illegal combination against the workmen under the declaration, and not saved by the statute—what we should now call a boycott.

Judge Crompton in this case reannounced the rule of law so often referred to in the text (see § 55) in these words: "It is a well-known rule of law that one man may do what may not be done by a number of persons combined, when it tends to injure another."

The next case was that of Shelbourne *v.* Oliver (13 L. T. R., N. S., 630), but rested solely under the statute. The defendant was not himself in the employ of the plaintiff, but was a member of a trades union, and had told him that unless one James, who was the only man who had stayed to help the plaintiff with some special orders he had on hand when the strike was initiated, was discharged, the others would not return to work. Although the court based their decision solely on the statute, for the reason that the action was brought against one defendant (Walsby *v.* Anley, ut supra), it is perfectly clear that the combination was an illegal conspiracy under the common law.

The next case was that of Skinner *v.* Kitch (10 Cox C. C., 493), also against a single defendant. It was held that the following letter was an endeavor by threats to force a manufacturer to limit the number of his workmen, etc., within the meaning of the statute:

"Mr. William Kitch,

"Sir: I am requested by the committee of carpenters and joiners to give the men in your employ notice to come out on

the English statutes which are intended to protect organized labor have usually not been cop-

strike against James Jordan, unless he become a member of the above society, not being any way disrespectful to you or him, but being compelled by the union and laws. This notice will be carried out after the 27th inst., unless settled in accordance with the society's laws.

"I remain, yours most respectfully,

"THOMAS SKINNER, *Secretary*."

This case is interesting as an authority for the principle that a combination to compel an employer not to employ non-union men is an unlawful conspiracy, at least under the English statute. See § 52.

The next case, occurring the same year, is that of the Queen *v.* Druit, already discussed above; and this case departs from the statute of George IV., for at that time the statute of 22 Victoria, Chapter 34, had been passed, § 1 of which enacts that "no workman or other person, etc., by reason merely of his entering into an agreement with any workmen, etc., or by reason merely of his endeavoring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, etc., shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said act." And it was held that the act of Victoria did not alter the common law. The case was sent to the jury, and the defendants found guilty of unlawful conspiracy, but not under the statute. This case is also one of the first authorities on picketing, and will be further discussed in that connection (see § 60), with the following cases of Reg. *v.* Shepard, and Reg. *v.* Bauld.

The next case, that of Reg. *v.* Bunn (12 Cox C. C., 316; see § 55), has been fully discussed already, and was rather a case of strike than boycott.

But the case of Queen *v.* Parnell (14 Cox C. C., 508) deserves attention, both from its historic interest and because

ied in this country (see § 59). Enough cases have been cited to show both the principles of

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it reannounced, at so late a date as 1881, the law of criminal conspiracy as applied to the boycott, set forth in § 55 and above in this section. It was an indictment against Parnell and others for conspiring to solicit tenants not to pay rents for which they were liable under their own contracts, which is a case quite indistinguishable from the case of laborers or labor unions conspiring to persuade employees to break their employment contracts, as in Reg. *v.* Bunn, above referred to, except, of course, so far as the law of such labor combinations has been modified by recent English statute. It was also a conspiracy to incite tenants to retake possession of their farms by force; but this, being itself a criminal offence at common law, is not so material. The court based their decision probably on the O'Connell case, which occurred in 1844, and the definition of conspiracy given by the celebrated commission headed by Lord Chief Justice Cockburn. They also approved the decision of Justice Willes in the Mulcahy Fenian case (L. R., 3 H. L., 306), that "A conspiracy consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means;" and go on to say, "By the terms 'illegal and unlawful' it is not intended to confine the definition to an act that would in itself be a crime or an offence, but that law extends to and may embrace many cases in which the purposes of a conspiracy, if done by one only, would not be a criminal act, as for instance, if several combined to violate a private right, the violation of which would be wrongful if done by one, though not in itself criminal. If, for instance, a tenant withholds his rent; that is a violation of the right of his landlord to receive it; but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is by the law of the land an offence. Conspiracy has been aptly described as divisible under three heads—where the end to be attained is

the common law, and the usual practical conditions and consequences of a boycotting conspir-

in itself a crime; where the object is lawful, but the means to be resorted to are unlawful; and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime. I think under these three heads every class of conspiracy ranks. And, gentlemen, I have to declare to you that it is a criminal act where two or more agree to have a crime committed; where two or more agree to effectuate their object by unlawful means; or where two or more agree to do an injury to a third party or to a class, though that injury, if done by any one alone, of his own motion, would not be in him a crime or an offence, but would be simply an injury, carrying with it a right to civil remedy. The court also say, "This law of conspiracy is not an invention of modern times. It is part of our common law; it has existed from time immemorial." And Justice Barry meets the frequent contention that an act or purpose should not make several persons guilty of criminal conspiracy when it would not be criminal if done or attempted by one person only, in the following words:

"The third and last case is where, with a malicious design to do an injury, the purpose is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offence under the criminal law. Thus an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency, would be a wrongful act which would entitle the party whose credit was thus attacked to bring an action as for a civil wrong, but it would not be an indictable offence. If it be asked on what principle a combination of several to effect the like wrongful purpose becomes an offence, the answer is, upon the same principle that any other civil wrong, when it assumes a more aggravated and formidable character, is constituted an offence, and becomes tranferred from the domain of the civil to that of the criminal law. . . . Thus the dividing line

acy; and, finally, to show the extreme antiquity of this law, we may quote in terms a case

between private wrongs, as entitling the party injured to civil remedies, and private wrongs thus converted into public wrongs, in other words into offences and crimes, is to be found in the more aggravated and formidable character which the violation of individual rights under given circumstances assumes. It is upon this principle that the law of conspiracy by which the violation of private right, which if done by one, would only be the subject of civil remedy, when done by several is constituted a crime, can be vindicated as necessary and just. It is obvious that a wrongful violation of another man's right committed by many assumes a far more formidable and offensive character than when commited by a single individual. The party assailed may be able, by resource to the ordinary civil remedies, to defend himself against the attacks of one. It becomes a very different thing when he has to defend himself against many combined to do him injury."

These words would appear to contain the best and most comprehensive statement of the reason of the subject.

The next case, that of Mogul Steamship Co. *v.* McGregor (66 L. T. R., N. S., 1; L. R., 23, Q. B. D., 598), is the more instructive because it is a case where the decision went the other way, and the alleged boycott was sustained as lawful; and moreover, it was a decision of the court of ultimate appeal, the House of Lords. The defendants were firms of shipowners trading between China and Europe, and with a view to obtaining a monopoly of the homeward trade, and thereby keeping up the rate of their own freight, they formed themselves into an association, and offered very favorable terms to merchants in China who would ship their goods exclusively in their vessels. The plaintiffs, also owners of ships in the China trade, were excluded from the association, and their business suffered in consequence; but there was no evidence of an obstruction of or interference

which, although decided in the year 1221, slept in the Latin manuscripts of the English Plea

with them or their business directly. The court held that the association being formed for the benefit of the defendants, and not with any desire to injure the plaintiffs specifically, was not an unlawful conspiracy. The case is certainly very close to the line, and is most interesting because it turned solely on the point for which we have so often contended, that the legality of a trade combination may become a purely moral question, and the same series of acts will be legal or illegal according as their direct intent is to benefit the persons combining, or to work injury to the business of others, or hamper them in the exercise of their usual rights. The court in their opinion differ from the case of Hilton *v.* Eckersley (6 Ellis and Blackstone, 47); but it may be questioned whether the two cases are not reconcilable. It is interesting to note that in their decision they also cited many American cases, notably State *v.* Buchanan (5 Har. & J., 317, noted above), and Morris Coal Co. *v.* Barclay Coal Co. (68 Penn. St., 173), which we have elsewhere discussed.

Perhaps the most recent case in England is that of Temperton *v.* Russell, occurring 1893 (69 L. T. R., N. S., 78). In this case the defendants were members and officers of certain trades-unions connected with the building trade, which unions adopted certain rules in relation to building operations. A firm of builders having refused to observe these rules, the union, in order to compel them to do so, endeavored to prevent other persons from supplying them with materials. The plaintiff, who supplied materials to that firm, refused to comply with this request of the unions, whereupon the defendants induced certain persons who had made contracts with him not to carry them out, and not to deal in the future with the plaintiff, by threatening to withdraw the union workmen who were employed by them, whereby the plaintiff suffered damage. The reader who has gone through our discussion of the subject should have little diffi-

Rolls until set forth in modern printed English by the zeal of the Seldon Society in 1887. It is as follows:

"The Abbot of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Peche, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it and that he never heard any such proclamation made by anyone. It is considered that he do defend himself twelve-handed (with eleven compurgators), and do come on Saturday with his law."

This is a remarkable report, for in twelve lines (ten lines of the law Latin) we have here set forth all the important principles of the law of boycott. The Abbot complains that the Shrewsbury people do him many injuries "*against his liberty*," *i.e.*, the Abbot claims a constitutional right to freely conduct his own business; then we have the recognition of the threat of a boycott as a particularly illegal act:

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culty in making up his mind that this was a conspiracy which rendered the defendants liable to damages at suit of the plaintiff, and the court so held; and there is no doubt that it was a criminal conspiracy also.

"They have caused *proclamation* to be made that none sell merchandise to the Abbot." The defendants admit the illegality of their conspiracy, because they deny it as a fact; and the bedell likewise denies that he ever made such proclamation or threat, whereupon (the plaintiff being a man of the Church) they are set to trial by wager of law instead of by actual battle, neither party nor the court making any question of the illegality both of the conspiracy and of the act complained of.

§ 58. **The American Decisions.**—The English common law of conspiracy was recognized by early decisions as existing in this country despite the Revolution, and despite the adoption of complete criminal codes. Thus, in Massachusetts, in 1807, a conspiracy to manufacture spurious indigo with a fraudulent intent to sell the same was held an indictable offence, although they did not in fact make any such sale.[1] It would be unnecessary to multiply citations on this point. The principal actual cases of boycotts which have been considered by the courts and held illegal are as follows:

Commonwealth *v.* Hunt (1842)[2] was an indictment against journeymen boot-makers for entering into an agreement that they would not

[1] Com. *v.* Judd, 2 Mass., 329.

[2] 4 Metcalf, 111.

work for any master who should employ any workman not a member of their society, after notice given him to discharge such workmen. The indictment also alleged that by means of such conspiracy they did compel one Wait to turn out of his employment one Horne, because Horne would not pay a sum of money due said society for a penalty under some one of its by-laws. The third count charged directly a conspiracy to impoverish Horne and hinder him from following his trade as journeyman bootmaker; and the fourth and fifth counts were similar. The court held that the English common law of conspiracy was in force in Massachusetts, but the very elaborate opinion of Chief Justice Shaw succeeds in finding imperfections in the form of each count of the indictment, the court seeming to admit that the confederacy set forth in the constitution of the defendants, the Boston Journeymen Bootmakers, was an unlawful conspiracy, but failing to find in the indictment any allegation of a conspiracy for any other purpose than to benefit the industrial condition of the defendants themselves. The case is now probably valuable as establishing clearly that persons have a legal right to "form themselves into a society and agree not to work for any person who should employ any journeyman or other person not a member of such society, *after notice given him to*

discharge such workmen." The first part of this is law to-day, but the italicized portion might well be questioned. Such a notice or threat would be very likely to amount to intimidation or a boycott against the obnoxious workmen. However, the first and second counts of this indictment were undoubtedly bad. But it is more difficult to follow the court in its desire to destroy the third count also; and it may well be doubted whether, if the case had arisen in the form of a civil action by Horne against the persons combining to prevent his getting employment, the court would have so decided.

The Supreme Court of New Jersey in the next important case following,[3] which seems to present circumstances practically similar, have very little doubt of the law, but are at some trouble not to expressly differ from Commonwealth *v.* Hunt. The indictment in the New Jersey case was doubtless much better drawn, as it alleged that the defendants, being journeymen workmen employed by Ward and others, in making patent leather, maliciously to control, injure, terrify and impoverish their employers, and force them to dismiss from their employment *certain persons*, to wit, Charles Beggan and William Prendegast, and to injure said Charles and William, unlawfully did conspire, etc. The court held that it

[3] State *v.* Donaldson, 32 N. J. Law, 151.

did not come within the express language of the New Jersey statute aimed at conspiracies to the injury of trade, but that the conspiracy was criminal under the common law, as an unwarrantable attempt to control the plaintiff in his business, and to the oppression of the obnoxious workmen. From this time (1867) there appears no more conflict in the American decisions than there is in the English.

In the same year, the Supreme Court of Massachusetts,[4] following Com. *v.* Hunt, refused to sustain an action in tort for damages by a shipping master against a union of sailors' boarding-house keepers, whose articles of association provided that "we will use our best endeavors to prevent our boarders shipping in any vessel where any of the crew shipped are from boarding-houses that are not in good standing with the association." The court held that the gist of the action was not the conspiracy, but the damage done the plaintiff by certain illegal acts of the defendants, and that in order to be good the declaration must allege the commission of illegal acts, which last proposition is certainly not the law. It appeared that the defendants not only took their men out of shops because the plaintiff's men were in the same, and refused to furnish men to him, but "did prevent men from

[4] Bowen *v.* Matheson, 14 Allen, 499.

shipping with him," for "it did notify the public that they had laid him on the shelf," and "did publicly notify his customers and theirs that he could not ship seamen for them." So far as the case can be sustained, it is in line with McGregor *v.* Mogul S. S. Co., but the decision cites no case except Com. *v.* Hunt, and considers each act of the combination solely as to the question whether it is illegal as a single act, tortious, or slanderous. Except in Massachusetts, the case must be considered of no authority.

Indeed, the next Massachusetts case is really inconsistent with it.[5] This case held that "A conspiracy to obtain from a master mechanic, whose business requires the employment of workmen, money which he is under no legal liability to pay, by inducing or threatening workmen to leave his employment, and deterring or threatening to deter others from entering it, so as to rendering him reasonably apprehensive that he cannot carry on business without making the payment, is illegal; and in an action of tort he may recover the sum so paid, and damages for the injury of his business by the acts of the conspirators." In this case the articles of association were far less objectionable than in the two preceding Massachusetts cases;

[5] Carew *v.* Rutherford, 106 Mass., 1.

perhaps the most questionable one being that "Any employer who shall be known to depreciate our trade shall be firmly discountenanced by this association, and such measures shall be adopted toward him as are not inimical to the laws of this republic, nor to the rights of said employer as a citizen of this republic." The facts were that the defendants extorted from the plaintiff a fine of five hundred dollars for employing workmen in New York, although he was unable to procure workmen to do that particular work in Boston; and he was compelled to pay the fine because, after the withdrawal of the defendants, he could not procure other stone-cutters not members of their association who had sufficient skill to carry out the contract in hand. The case was decided by Judge Chapman, who also wrote the opinion in Bowen *v.* Matheson, and it would seem as if the peculiar hardship of this case had enlightened the learned justice on the law.

This case was soon followed (in 1871) by Walker *v.* Cronin,[6] where an action of tort for damages was sustained for a conspiracy of the defendants to induce the plaintiff's employees, shoe-makers, to leave his employment, some of them being under contract, and to prevent others from entering it. This case goes rather far in

[6] 107 Mass., 555.

the other direction, as the action was sustained on all counts, including the one which did not set forth that the workmen persuaded to leave were under any contract to stay. It would appear, however, that the defendants were not themselves in the employ of the plaintiff—a fact of which the court took no special notice, but which, as we have shown above, is very material; and indeed it is probably only for this reason that the case would now be followed. As showing how little the law of boycotting had been developed only twenty-five years ago, it is interesting to note that the court have more doubt about the count which alleges the persuading of employees not under contract to leave than they have about the others.

The case of State *v.* Glidden,[7] decided in 1886, is the first reported American case in which the word "boycott" is used. Here the indictment set forth that the defendants, who were printers belonging to a union, conspired to compel a newspaper publishing company to discharge certain workmen, who were, of course, non-union men, and to employ the defendants, with the usual counts alleging an intent to injure the complaining company and the boycotting employees. The Connecticut statute of 1878, providing that every person who should intimi-

[7] 55 Ct., 46.

date another, or compel such other to do or abstain from doing any act which he has a legal right to do, or persistently follow such person, etc., was clearly in point, and made the combination unlawful, both in its purpose and in its means; but the court went on to say, with the greatest particularity, that the conspiracy was criminal upon authority; that is, upon common law grounds; saying:

"If we were to attempt to give a rule applicable to this branch of the subject, we should say that it is a criminal offence for two or more persons corruptly or maliciously to confederate and agree together to deprive another of his liberty or property. Such a rule is proximately correct and practically just."

This boycott was attended with the ordinary incidents of endeavoring to injure the complainant's trade; a circular was dropped about the streets containing the words, "A word to the wise is sufficient. Boycott the *Journal and Courier*," and was admitted in evidence, as was also the testimony of one Bertha Palm, to the effect that she overheard five or six union printers, among whom was one of the defendants, say that they were paying fifty cents a week apiece for the expenses of the *Courier* boycott, and that "it would be paid for by the *Courier*."

In the same year an indictment was sustained where the defendants, members of trades unions

in the city of Richmond, combined to make threats to certain customers of Baughmann Brothers, printers, among them H. J. Meyers, that if they thereafter bought anything from Baughmann Brothers, or employed them in their business, they—the defendants—would do all in their power to break up the business of said H. J. Meyers, or other customers of Baughmann Brothers. The court held that it amounted to a conspiracy at common law in Virginia; that the English law of conspiracy was in force there, and that "any conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of anyone, by wrongfully preventing those who would be customers from buying anything from, or employing the representatives of, said business, by threats, intimidation, or other forcible means, is unlawful," and said, "An act may be immoral, for instance, without being indictable, but when immoral acts are committed by numbers in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy. . . ."

"By 'unlawful' it is not intended to mean that the acts agreed to be done must be criminal; it is enough if they are wrongful and with an improper or evil intent; thus it has been held that threats, intimidation, or any forcible

means, other than lawful competition, are unlawful. . . ."

"The intent with which an act is done must always be taken into consideration in arriving at the legality of a transaction. And in this connection I call attention to the fact that the law looks at the intent rather than the motive. The intent is the immediate purpose with which the act is done, while the motive is the desire in the mind to attain some ultimate object. Thus the man who sets fire to his neighbor's grain to prevent it being manufactured into liquor, might be said, possibly, to be actuated by a good motive; but the specific intent of that act would be to destroy his neighbor's property, and that intent the law brands as evil, and it refuses to inquire further into the motive (May's Crim. L., § 6). When a man does the thing forbidden by law, moved by the intent prohibited, it is of no avail for him that he also intends an ultimate good." [8]

In Old Dominion S. S. Co. *v.* McKenna (1887),[9] the principle is at last clearly announced that the procurement of workmen to quit in a body for the purpose of inflicting damage upon the employer, by persons who are not in his employ, and until he should accede to demands of such

[8] 11 Va. L. J., 324, Com. *v.* Shelton (1887).
[9] 30 F. R., 48.

outside persons, which he is under no obligation to grant, constitutes an unlawful conspiracy. The case was an ordinary boycott of the steamship company for not paying southern negroes the same wages as New York longshoremen. The defendants, who called themselves "The Executive Board of the Ocean Association of Longshoremen's Union," were not in the plaintiff's employ; and after persuading his workmen to quit, declared a boycott against him in the ordinary way, by sending notices and messengers to steamship agents, wharfingers, and warehousemen. The word "boycott" is used in the opinion.

In the year preceding, the leading case of People *v.* Wilzig [10] was decided in New York. This was the well-known boycott of Theiss's saloon on East Fourteenth Street, New York, and was based on a demand that he should discharge his orchestra and employ only members of a certain musical union at their union prices; and also discharge his waiters and employ only union waiters; that he should abolish the percentage system, and not exact deposits for their badges or utensils. Two other defendants demanded that he should discharge all his bartenders and employ only members of that union at their price. Mr. Theiss replied that his

[10] 4 N. Y. Crim. Rep., 403.

brother-in-law was his head bartender, his son was his head waiter, his wife was cashier, and the leader of his orchestra—Mr. Eschert—a man whom he had known for ten years, and who had been associated with him in business, and that all his fortune was invested in the business. The defendants, representing the Knights of Labor and the Central Labor Union, replied that they had merely come there to make their demands, and unless they were complied with in less than twenty-four hours a boycott would be placed upon his business, which was duly ordered. The boycott consisted in a body of men walking up and down in front of his saloon, wearing old and dilapidated pants pasted over with circulars headed "Boycott," libellous in their character, announcing that Theiss was a foe of organized labor, and calling upon all people to abstain from visiting his place. This circular was signed by the Boycott Committee of the Central Labor Union. A crowd of five hundred people collected and obstructed Mr. Theiss's business for fifteen days. They went also to the man who sold Mr. Theiss mineral water, and the brewer who supplied him with beer and held a mortgage on his property, and asked the one to cease selling him mineral water, and the other to foreclose his mortgage. The efforts of the boycotters prevailed, and Mr. Theiss finally acceded to their demands, and,

moreover, gave them a check of one thousand dollars for their expenses in carrying on the boycott. The defendants were indicted for criminal conspiracy and extortion under the New York code, and it is needless to say the indictment was sustained; the defendants were all convicted by a jury and sentenced for terms varying from three years and eight months to one year and six months.

In the same year, and by the same judge, there was a case of a boycott against Mrs. Landgraff, proprietress of a small bakery, where the facts showed intimidation, the distribution of circulars, etc. Many of the "requests to charge," proferred by Mr. Goff, now recorder in New York City, and their rejection by the court, in this case are very instructive. The defendants were sentenced for terms ranging from ten to thirty days.[11]

Both these cases arose under the New York Penal Code, the former under §§ 552 and 553, for extortion, the latter under 168, Subdivision 5, and 653, Subdivision 3, for conspiracy. But in both cases the court substantially consider and state the common law.

Then arose the case of the People *ex rel.* Gill *v.* Smith, very interesting in its facts, but singularly unsatisfactory in the opinion. The facts in this

[11] People *v.* Kostka, 4 N. Y. Crim. Rep., 429.

case, and in People *ex rel.* Gill *v.* Walsh, under which name the case was appealed,[12] were that Gardner & Estes were owners of a shoe factory, of which Hartt, the complainant, was foreman; that said Hartt caused the discharge of one Potter, an employee, on suspicion of swindling the firm by altering checks and coupons, and thereby securing payment for labor not performed. The shop was what was known as a "union" shop; and when Hartt was first employed as foreman, the defendant Gill, who was an officer of a shoemakers' trades union known as "District Assembly No. 91 of the Knights of Labor," and was also employed in the manufactory of Gardner & Estes, went, with others of the employees, to the firm and objected to working under Hartt for the reason that he was an "old-time scab," who would try to reduce wages. At the request of the firm, the employees agreed to lay the matter over for a month "to see whether Hartt would attempt to undermine the organization." At the end of the month, nothing having occurred to excite their suspicion, they postponed consideration of the subject for two months longer, and before the expiration of that period Hartt had discharged the foreman Potter for swindling. The crew, that is the employees of the shop, demanded Potter's reinstatement, and upon their demands

[12] 1 N. Y. Crim., 292; 5 N. Y. Crim., 509.

Potter was reinstated pending the return of Mr. Gardner from the South. But when Mr. Gardner returned, having investigated the circumstances, he directed Potter to be discharged by Hartt, whereupon a lockout or strike—it does not clearly appear which occurred, and the firm's business was stopped. The relator Gill and his co-defendant, constituted an executive committee in District Assembly 91 K. of L., then called upon the firm and demanded the discharge, not only of Hartt, but of two other foremen, and also that Potter should be reinstated. The firm refused to comply, and several conversations took place, at which the union committee refused to listen to any proposition except on condition that Hartt should be finally discharged. They were asked whether in that case they would in any way endeavor to prevent Hartt obtaining employment elsewhere, and in answer they declared that Hartt should not thereafter obtain any employment within the jurisdiction of District Assembly No. 91, which includes the city of New York and the surrounding country for fifty miles. Gardner & Estes were at last compelled to yield to the demands of the strikers, and cease their efforts to protect Hartt. They informed him that he must resign or be discharged, whereupon Hartt ceased work under protest. The Court held that while a peaceable strike for the purpose of obtaining an advance

in the rate of wages, or maintaining such rate, was not an offence against the provisions of the New York Penal Code (§ 170), yet a combination to strike, or a strike for unlawful purposes, there being no relation between the strike and the wages of the striking employees, was a criminal conspiracy, and that the effort to prevent Hartt from obtaining employment or keeping his present position was such an unlawful purpose. It appears from the second case that both cases proceeded under the common law as well as under §§ 169, 170 of the New York Penal Code, though neither counsel seem to have had any particular sense of the legal doctrines they were invoking, or the chain of decisions by which their case was really governed. But the facts of this case are most interesting as clearly showing the precise definition that, while a strike to raise wages is lawful enough, a strike, or threat to strike, for the purpose of boycotting another person is a criminal conspiracy.

About the same time (1888) we find a decision of the United States Supreme Court[13] which fully recognizes the English law of conspiracy and boycotting, and the principle that it is indictable for two or more to confederate and combine together even against the liberty of an individual; and a conviction of the District of

[13] Callan *v.* Wilson, 127 U. S., 540.

Columbia court of certain musicians, members of the Knights of Labor, for boycotting members of the local association for refusing to pay a fine, was sustained.

And in the same year occurred the leading American case on picketing, the Massachusetts case of Sherry *v.* Perkins,[14] where an injunction was granted to prevent a lasters' union from parading in front of the plaintiff's works with banners and inscriptions, to the effect that "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U." It will be noted that it does not appear in the case that the defendants were employees of the plaintiff, which is a material point, and that the carrying of banners was held to overstep the limit of reasonable persuasion; but the bill also alleged intimidation, and the case, as reported, so found. Moreover, there was a Massachusetts statute to the effect that "whoever by intimidation or force prevents or seeks to prevent a person from entering into or continuing in the employment of another shall be punished by fine, etc." The court well finished what remained of Bowen *v.* Matheson when they say that the wrong did not consist in a libel on the plaintiffs' business, but in the combination; and the injunction was granted on the ground that the injury was con-

[14] 147 Mass., 212.

tinuous, and an adequate remedy could not be given by damages in a suit at law. But we must admit that if there was no other intimidation than the carrying of banners asking employees not to work, the case is very near the line.

In the same year Baughmann's case, cited above, from the original judgment of the hustings court of Richmond came up on appeal in the Supreme Court of Virginia, and the court affirmed the principle that a conspiracy to injure the business of an individual is unlawful; and that in such case it is not necessary to show that the means used were unlawful, although such charges were in fact made; and boycotting was expressly declared contrary to the common law of Virginia.[15]

And in the same month arose the Pennsylvania leading case of Brace *v.* Evans.[16] The plaintiffs were operating a steam laundry, employing one hundred and thirty-nine persons, about ninety of whom were girls. Having discharged eleven of the latter, who afterward persuaded some others also to leave their employment, they were waited upon by representatives of the Knights of Labor and Trades Assembly, demanding their reinstatement. Afterward circulars were issued alleging abusive treatment, and placards with the words "Boycott Brace Brothers,"

[15] Crump *v.* Com., 84 Va., 927.
[16] 3 R. & Corp. L. J., 561.

carried by men who followed the plaintiffs' wagons, took down the names of their customers, and afterward visited them, endeavoring to persuade them from further patronizing the plaintiffs. A civil action was first brought, but these acts continuing, the prayer for the injunction was made; and it is, perhaps, needless to say that the court granted it, noting particularly that the defendants were not employees of the plaintiffs; the court saying that whether the plaintiffs compelled their employees to work too long hours or not, the defendants had no right to pass judgment upon them and organize for the punishment of their supposed offence. If this were so, the plaintiffs might resolve that the conduct of the girls who were discharged justified them in preventing their employment elsewhere. It is in this case that the celebrated catch-phrase seems to have originated, "the use of the word boycott is in itself a threat."

We then find a series of decisions in the Federal Circuit courts; the leading one is Casey *v.* Cincinnati Typographical Union.[17] This was a combination of members of a trades union, a duly organized corporation, but not employees of the plaintiff newspaper, to boycott it for refusing to employ only union labor in its office. The methods adopted were the circulation of hand-

[17] 45 F. R., 135.

bills to working men, asking them to withdraw their patronage, a demand upon news agents to give up the agency of the plaintiff's newspaper, saying "if you do not do so, we will have to consider you an enemy to organized labor;" and circulars asking working men not to patronize merchants who advertised in his newspaper, and circulars requesting merchants not to advertise in it. The combination was declared a boycott, and a preliminary injunction granted.

In 1893 arose the first important case of a boycott, not of an employer by his employees or their sympathizers, but of one merchant by another. The Dueber Watchcase Manufacturing Company brought suit against the Howard Company [18] for damages resulting from an illegal conspiracy to destroy the plaintiff's trade, alleging that the defendants mutually agreed and notified all watch dealers throughout the United States that they would not thereafter sell any cases manufactured by them to any person who should buy or sell any goods manufactured by the Dueber Company; whereupon a large number of dealers withdrew their patronage from the latter company, and ceased to deal in these goods; that prior to November 16, 1887, the defendants had agreed that they would maintain an arbitrary fixed price for their goods; and

[18] 55 F. R., 851.

the agreement complained of was for the sole purpose of compelling plaintiff to join with the defendants in maintaining such arbitrary price —the purpose being to establish a monopoly in watchcases, crush competition, and drive the plaintiff from business unless he joined them. The bill also charged that after the passage of the Anti-Trust Act of 1890 the defendants ratified and continued such agreement in violation thereof, and treble damages were demanded under § 7 of the Act. This action, however, failed because it was not alleged that defendants were engaged in interstate commerce, and the contract was held not to be one in restraint of trade under the common law. But the court (Judge Coxe) do not seem to have had the law of boycott much in mind, as none of the authorities on this point are cited, and when the case came up on appeal the decision was affirmed. The complaint was amended, but still appeared to be brought under the Interstate Commerce Act; but this was probably done for the purpose of giving the federal courts jurisdiction, and the decision of the majority went on the ground that it was not shown to be a monopoly of interstate trade. The case, therefore, while presenting an interesting case of the ordinary boycott, went off on the sole question whether it came under the Interstate Commerce Act, and is of no value as an authority.

But the same case arose in the courts of New York state, in the form of an action for conspiracy, in which the Dueber Company claimed that the Howard Company, engaged in a business similar to the plaintiffs, agreed, in furtherance of a conspiracy to ruin the plaintiff, not to sell any of their goods to any person who should deal in the plaintiff's goods; and it was held by Judge Paterson that this declaration was good on demurrer, and even that no specific damage resulting from defendant's conspiracy need be alleged, but that the general charge that the defendants intended to ruin the plaintiff's business was sufficient.[19]

And the next year, the decision of the Circuit Court in Hagan *v.* Blindell[20] was sustained at common law, though denied under the Interstate Commerce Act, under which a suit for an injunction could only be brought by the government. The facts were that the plaintiffs, owners of a steamship, were prevented by the combination of the defendants from shipping a crew. It does not appear, in the very imperfect report, who the defendants were, but it is probable that they were not themselves members of the crew, but were some sailors' union or combination of sailors' agencies.

[19] 24 N. Y. Sup., 647.
[20] 54 F. R., 40; 56 F. R., 696.

In 1893 the case of Van Horn *v.* Van Horn was decided in New Jersey,[21] which was a case where Emma Van Horn and her husband brought suit against Amos Van Horn and another for conspiring to injure Emma in her business of selling fancy goods, both parties being engaged in the furniture business in neighboring streets. The point of the decision was that the plaintiffs, having failed to prove the conspiracy, might nevertheless recover against one defendant for false representations by which they were injured, and the case is principally noteworthy for the following passage in the opinion:

"While a trader may lawfully engage in the sharpest competition with those in a like business, by holding out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results from it the injured party is entitled to redress. Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation."

Pettibone *v.* United States[22] is a very interesting case, and is so near the line of criminal conspiracy that the decision must be considered

[21] 56 N. J. Law, 318.

[22] 148 U. S., 197.

of doubtful authority, particularly as Justices Brewer and Brown dissented. There was a strike in the mine of Northern Idaho, and Pettibone, with others, was indicted under U. S. R. S. 5399, 5440 for impeding by threats the administration of justice in the United States courts, and for conspiring to do so. A writ of injunction had been issued by the Circuit Court, on a bill brought by the Bunker Hill Mining Company against the Miners' Union, against the plaintiffs in error, and many others, from interfering with the mining company, or by force, or threats, or otherwise, making any attempts to intimidate an employee, or any other person from taking service with the plaintiff company, etc. The indictment averred that the defendants conspired to intimidate the employees and others from so working; but was clearly defective in not averring that the defendants had conspired to cause the parties served to disobey the injunction, although it did set forth in general terms that they conspired to impede the administration of justice in the United States Circuit Court. The court affirmed the old rule of pleading set forth in Commonwealth *v.* Hunt,[23] that an indictment for criminal conspiracy must set forth the purpose, if the purpose be criminal or illegal, and the means, if the means be so, when

[23] 4 Met., 111. See above.

the purpose is not in itself unlawful, and quashed the indictment for the defect we have noted. But the case seems to us not in consonance with the best authorities on another point: It was a criminal offence, under the statutes of Idaho, to conspire by intimidation to compel employees to leave work, and, although the defendants could not have been tried in the United States Court directly for violation of this Idaho statute, it seems that its existence would be sufficient to make the purpose of the combination illegal within the accepted definition of the word in the law of conspiracy. Of course, if the intimidation could be considered to be merely *malum prohibitum* and not *malum in se*, the prohibition of the Idaho statute would not have the effect of making a combination to break it criminal in the federal court; but one can hardly take this view of the facts. And in 1893 it was held by the Supreme Court of Pennsylvania,[24] that "a court of equity will enjoin discharged employees or members of a union" (or, it would seem, other persons) "from gathering about the plaintiff's place of business, and from following his employees to and from work, and gathering about their boarding-places, and from any and all manner of threats, intimidation, ridicule, and nuisance."

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[24] Murdock *v.* Walker, 152 Pa., 595.

We have now come down to the boycott cases occurring in consequence of the Pullman strike in 1894. Most of these will better be considered under §§ 65 and 66, as the decision commonly turned either upon the Anti-Trust or Inter-state Commerce Law, or upon the fact that the acts were committed against railroads in the hands of receivers; but it was repeatedly held that a combination to injure the owner of cars (the Pullman Co.) operated by railroad companies under contracts with it, by compelling them to give up using its cars in violation of their contracts or otherwise, and on their refusal to incite railroad employees to quit work, was a boycott and unlawful conspiracy. A good example of a case so holding is Thomas *v.* Cincinnati, N. O. & T. P. R. Co.,[25] in which decision Judge Taft also notes as an important point, that the conspiracy had no effect, and was meant to have no effect, on the character or reward of services of the employees actually combining; and also that a conspiracy to compel an employer (the Pullman Co.) to pay its employees more wages, by inciting the employees of all the railroads of the country to strike, was an unlawful conspiracy by reason of its purpose, even when the means were such as would usually be lawful. This case arose on the petition of the receiver of

[25] 26 F. R., 803.

the railroad for the commitment of one Phelan for contempt, he, with Debs, having been enjoined from taking part in the boycott; and the legality of defendants' acts only came into the case by the court's considering whether the injunction issued was a proper one. Phelan was sentenced to jail for six months.

The principal case is, of course, that of U. S. *v.* Debs,[26] but this case was expressly based on the Anti-Trust Act, and the only question left to the Supreme Court on *habeas corpus* (158 U. S.) was whether the Circuit Court had jurisdiction of the case sitting as a court of equity under the Anti-Trust Act or otherwise. The case is more fully discussed in §§ 66, 67.

The most recent boycott case in any state court occurred in Oregon, in December, 1894.[27] Here the court refused on the facts to grant the injunction, and sustained the demurrer to the bill, which set forth that the defendants were all printers, members of a printers' union, with by-laws which expressly provided for boycotting in certain cases; that the plaintiff refused to submit to the regulations of the union, and for this reason, and because he would not discharge a certain messenger boy, they ordered a strike, which was effective, and printed advertisements in the newspapers urging persons "intending to

[26] 64 F. R., 724.

[27] Longshore Printing Co. *v.* Howell, 26 Ore., 527.

have job printing done to bear in mind that the Longshore establishment was a non-union office," visited numerous customers of the plaintiff, and held out the threat to them that if they did not withdraw their business from the plaintiff the union and their friends would withdraw their business from them; that the plaintiff put in a bid to the Common Council of the city of Portland for the city printing for the year, which was the lowest bid, but the defendants threatened the members of the city council with injury to their private business interests if they accepted it, and for that reason alone they refused it, and otherwise persistently visited and harassed the patrons of plaintiff with demands that they cease to give their work to it, closing with the usual allegations that it was a conspiracy to destroy the plaintiff's business. The court quotes a great deal of excellent law, but it certainly is difficult to see why the allegations in the bill did not set forth a pretty substantial boycott.

There is a still more recent case to the same effect, where an injunction was refused against a labor union from parading the streets with placards calling attention to the fact that plaintiff was an enemy of organized labor; but the opinion is of little authority.[28]

The latest case of authority is that of the

[28] De Pear *v.* The Cooks' Union, District Court of Colorado, 27 Chicago Legal News, 387.

United States *v.* Cassidy,[29] which was a railroad case in the District Court of California, growing out of the Pullman strike. Defendants were indicted for conspiracy, and Judge Morrow in charging the jury repeats the old rule that, while employees may combine and form unions for their own benefit and protection, they cannot combine and quit work for the purpose of compelling their employer to join in a boycott against a third party.

There are a few other decisions on the *trade* boycott. Thus, in Bohn Mfg. Co. *v.* Hollis,[30] a large number of retail lumber dealers had formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that whenever any dealer made such a sale their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary (Hollis) threatened to give notice accordingly; and an injunction restraining him from so doing was denied. It would seem this decision can be sustained on a ground not adverted to in the opinion, that the dealers' union

[29] 67 F. R., 700.

[30] 54 Minn., 223; 55 N. W., 1119.

being legal (see § 54), he was a member of it, and hence had voluntarily assented to whatever boycotting might result; moreover (as the court observe) they were not proposing to send the notice to any but other members of the association.

This is certainly the only ground upon which Olive *v.* Van Patten [31] can be distinguished, decided the same year by the Texas Court of Appeals. This was a case where a petition was brought by the proprietor of a saw-mill against the defendants, who had entered into a lumber dealers' association of which, however, the plaintiff was not a member, with a by-law to the same effect, that when any manufacturer or wholesale dealer should sell to any person not a dealer, at a point where there was *no* dealer, such sales should be reported to the secretary, who should thereupon notify the members of the association, whereupon it should be their duty to discontinue their patronage of such wholesale dealer. In this case the circular had been actually sent by the secretary to the members of the association, and the plaintiff therefore claimed damages, as well as an injunction restraining defendants from "further perpetration and continuation of their wrongful acts"—*i.e.*, from combining not to buy of the plaintiff. The court

[31] 25 S. W., 428.

below had sustained a general demurrer to the petition, and its judgment was reversed upon the authority of Delz *v.* Winfree.[32] This latter was a case where defendants had agreed not to sell to the plaintiff, who was a butcher, any live animals or slaughtered meat, and induced others not to sell to him also; and it was decided that while a person has the right to refuse to have business relations with another, whether the refusal is based upon reason, whim, prejudice, or malice, "the privilege is limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing."

It will be seen that both these cases are directly contrary to Bohn *v.* Hollis, unless the fact that in neither was the plaintiff a member of the dealers' association makes a difference; and, of course, the legality of such associations, as between themselves and their members, depends not upon the law of boycotting, but upon the sole question whether they are in restraint of trade, which has been fully discussed in § 54 above.

But Bohn *v.* Hollis was expressly dissented from in Jackson *v.* Stanfield (1894),[33] one of the

[32] 80 Texas, 400; 16 S. W., 111.

[33] 36 N. E., 345.

most instructive and recent cases on the trade boycott. The Retail Lumber Dealers' Association of Indiana, by its by-laws, gave an active member a claim against a wholesaler for selling to a person not a regular dealer in such member's community, provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. The plaintiff, who was not a regular dealer, underbid the defendant on a contract, but the wholesalers refused to sell to him, and he was obliged to abandon the contract because the defendant, an active member of the association, had previously enforced a claim against the wholesaler who had sold to the plaintiff, and expressed an intention of continuing to enforce such claims. The court granted a perpetual injunction against the defendant from making any claim under the by-laws of the association against any person, though a member of it, who sold to the plaintiff, thereby practically annulling the association's by-law; and, moreover, allowed damages against the defendant for the amount which the plaintiff had lost by abandoning his contract. In this case will be found a full discussion of all the recent cases.

The case of Cote *v.* Murphy,[34] decided in 1894, is particularly interesting in that it justifies a

[34] 28 Atlantic, 190; 159 Pa. St , 420.

boycott, or combination of employers, when made solely in defence to a combination of employees to raise wages, although the latter combination was expressly legalized by the Pennsylvania statute, which, however, did not include employers within its provisions. Incidentally the court raise a query whether the statute is not unconstitutional as being class legislation, and that the legalizing such combinations in labor disputes ought to extend to both parties to the contract, which is substantially the case in the English statute.

A still later case is that of Barr *v.* the Essex Trades Council,[35] where the proprietor of a newspaper brought a bill in equity against eighteen labor unions in the city of Newark, one of which was incorporated, upon the following complicated but interesting state of facts: These labor unions had established an elaborate system, under the name of Essex Trades Council, a voluntary association composed of delegates from each union, by which, upon reports of the individual members of the unions dealing with any shop or place of business, made upon blank slips, to the central body, cards were issued by the Essex Trades Council, to be displayed in shops, stating that the establishments so favored were "especially deserving the patronage of or-

[35] 30 Atlantic, 881.

ganized fair consumers." A failure by any union to report upon a shop with which its members dealt for two consecutive months, placed its products under the ban of organized labor as represented by the Essex Trades Council. The next step was an agreement in writing purporting to be made between the Essex Trades Council and a tradesman, by which the latter, "in return for the patronage of united fair consumers," promises and agrees to buy as a consumer, engage as employer, keep as dealer, as exclusively as he can, such labor and goods as may be announced as "fair" by a particular union and endorsed by the Essex Trades Council. The cards then issued, certifying that the person so favored is a "fair consuming dealer," were of such size, color, and appearance that if publicly displayed in stores or places of business would attract attention; and there was also a small pamphlet published by the Essex Trades Council, called "The Fair List of Newark, N. J.," announced to be "for the information of people who buy service or product, and who have enterprise enough to seek to place their money where it will do the most good," containing names and addresses of tradesmen, persons in business, lawyers, and others in Newark. This is perhaps the most elaborate system of attempted labor union for all purposes of trade or dealings, including a combination system of

general boycott upon all the world not so favored, which has yet come to the notice of the courts.

Upon this state of facts the complainant had made a contract to employ what is called "plate matter"—that is, made of stereotyped plates for certain sheets of newspaper, which plates were manufactured in New York, and were used generally throughout the state of New Jersey by newspapers, except one in the city of Newark, without complaints by the typographical unions. All his employees were, however, members of the local typographical union, which had declared against the use of such plate matter in the city of Newark, as the plaintiff knew. He sought to have this resolution relaxed in favor of his paper; but, on its refusal so to do, nevertheless informed his foreman that he would use plate matter on and after March 13, 1894, but that the union scale of wages would be maintained, and that he would gladly retain the services of such as might be willing to stay. Some of his employees remained, but others left; and the union withdrew its endorsement of the newspaper, and informed the Essex Trades Council of the fact, whereupon the Council issued a circular in the following words: "Friends, one and all! Leave this council-boycotting Newark *Times* alone. Cease buying it! Cease handling it! Cease advertising in it! Keep the money

of fair men moving only among fair men. Boycott the boycotter of organized fair labor." This circular was distributed in the city of Newark; various other smaller circulars were issued, and the bill alleged that in consequence many dealers in and purchasers of the complainant's paper, and advertisers therein, had been intimidated from continuing to buy and advertise therein. The court found that an injury had thereby been done the complainant's business, and, without deciding that the action of the defendants constituted a criminal conspiracy, the statute of New Jersey now requiring an overt act, held that they had clearly combined to injure the plaintiff's property and freedom in disposing of his own capital and managing his own business; that they were, therefore, liable for damages, and that, although the boycott was not conducted with violence or physical intimidation, the moral intimidation caused by the complainant's fear of loss of business was sufficient to make the combination unlawful, and an injunction was granted prohibiting defendants "from distributing or circulating any circulars, printed resolutions, bulletins, or other publications containing appeals or threats against the Newark *Times*, and from making any threats or using any intimidation to the dealers or advertisers in such newspapers."

Finally, the last reported case on the subject

of boycotting[36] goes back to the criminal law, and, like almost the first American case on the subject, occurred in Vermont. Defendants were indicted for conspiracy to prevent one McClure from working for the Wetmore & Morse Granite Co., by threats and intimidation, and for coercing granite cutters to join the National Stone Cutters' Union, and preventing other granite cutters from obtaining work or entering the employment of the complainant, by threatening McClure that, if he did not join the union, they would organize a strike both against him and the complainant company. The conviction of the defendants was sustained, and the case of State *v.* Stewart reaffirmed.

§ 59. **American Statutes on Boycotting.**—Such being the court decisions on boycotting at common law and under the English statute, we are now in a position to understand the meaning and effect of the several statutes which have been passed in the states of the Union upon this subject; and in the first place, it may be well to remind the reader of the ordinary statutes against intimidation by one person, or by individuals acting in combination, which were set forth in § 5 above. Of course, in the states which have such statutes applying to interference

[36] State *v.* Dyer, 32 Atlantic Rep., 814.

with or intimidation of employees or employers by individuals, and rendering such acts criminal or penal, a combination of two or more persons to perform any such act, or to attain any end to which the commission of such acts is a necessary means, would become by the very force of such statutes a boycott or unlawful conspiracy. In this section, therefore, we have only left to consider such statutes as exclusively apply to combinations; and they are as follows:

It is forbidden by statute, or made criminal or penal, to conspire for the following purposes respectively in the states named. Thus,

(1) In Wisconsin, for the purpose of preventing any person from procuring work,

(2) for the purpose of procuring the discharge of any workman,

(3) or for the employer to attempt to prevent any person from obtaining employment whom he has discharged.[1]

(4) To conspire to wilfully injure or destroy or obstruct the use of the property of another, or to obstruct him in the prosecution of his lawful business or pursuits.[2] This is substantially

[1] Wis., 1895, 240, 1, 2.

[2] R. I., 242, 40; Me. R. S., 1883, 126, 18; Wis., 1887, 287; R. S., 446 a. But for much the most drastic law of this sort see the laws of Illinois, Michigan, and Kansas, printed in full in the note to § 62, which, although primarily applying to railways, seem equally to apply to all other corporations, persons, or occupations.

the common law of boycotts as laid down in the leading English and American cases, and in the English statute of 1875.

(5) It is made a criminal offence for any one or more persons to persistently follow a person in a disorderly manner, or injure, or threaten to injure, his property with intent to intimidate him.[3] This is substantially similar to the Rhode Island statute above, with the exception that, following the English statute, it adds the offence of picketing, and seems to prohibit it even by one or two persons, at least when done in a disorderly manner. The special subject of picketing will be discussed in the next section.

(6) A combination "to commit any act injurious to trade or commerce."[4] This would appear to be an *omnibus* clause which might let in almost anything, not only ordinary boycotts, but agreements or trusts tending to monopoly, or in general restraint of trade. This, of course, was the common law, but it will be remembered that in England, by recent statutes, combinations are no longer criminal so far as they are simply in restraint of trade. The tendency in this country through the Anti-Trust Act has been in the other direction, and it is probable that the effect of that statute will be to make many a combination criminal, as in restraint of trade or

[3] Ct., 1518.

[4] N. Y. P. C., 168.

interstate commerce, which would not otherwise have been so. (Compare § 66 below.)

The efforts of the labor unions in England have recently been directed to confining intimidation to threats of actual injury to person or property, but so far they have not been successful, unless indeed the recent general statute be held to cover such cases, and upon this there is as yet no decision.

There are, however, more elaborate statutes in the states of New York, Illinois, Michigan, Minnesota, Tennessee, and Texas, but as they establish no new principle in the law of boycott, want of space precludes setting them forth at length in the text. They will be found copied below.[5]

[5] If two or more persons conspire, either

(1) To prevent another from exercising a lawful trade or calling, or doing any lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof ; or,

(2) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws ;

Each of them is guilty of a misdemeanor. N. Y. P. E., 168; Minn., 6423.

If any two or more persons conspire and agree together [or the officers or executive committee of any society, or organization, or corporation shall issue or utter any circular or edict as the action of or instruction to its members, or any other persons, societies, organizations, or corporations, for the pur-

On the other hand, a few states are beginning to pass statutes enlarging the liberty of laboring

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pose of establishing a so-called boycott or black list; or shall post or distribute any written or printed notice in any place] with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment, or property of another, . . . or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the state or the authorities of any county, city, town, or village, or to induce any person not to enter into such competition, . . . they shall be deemed guilty of a conspiracy, shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding $2,000. Ill., 38,73. (The part in brackets, as it is interesting to note, has been repealed.)

If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger, or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property on such terms as the parties concerned may agree upon, such persons so offending shall be fined not exceeding $500, or confined in the county jail not exceeding six months. Ill., 38, 206.

It is unlawful for corporations, their officers or agents to "threaten to discharge any such employee or employees for trading or dealing, or for not trading or dealing, as a customer or patron with any particular merchant or other person or class of persons in any business calling, or to notify any employee or employees, either by general or special notice, directly or indirectly, secretly or openly given, not to trade or deal as customer or patron with any particular merchant or person or class of persons, in any business or calling, under penalty of being discharged from the service of such corpo-

men to form offensive and defensive combinations, and narrowing the common law of boy-

ration doing business in this state as aforesaid." Tenn., 1887, 208, 1.

If any two or more persons shall associate themselves together in any society or organization whatever, with intent and for the purpose of preventing, in any manner whatever, any person or persons whomsoever from apprenticing himself or themselves to learn and practise any trade, craft, vocation, or calling whatsoever, or for the purpose of inducing, by persuasion, threats, fraud, or any other means, any apprentice or apprentices to any such trade, craft, vocation, or calling, to leave the employment of their employer or employers, or for the purpose, by any means whatever, of preventing or deterring any person or persons whomsoever, from learning or practising any such trade, craft, vocation, or calling whatsoever; every such person so associating himself in such society or organization shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as prescribed in § 4310 of this code. Ga., 4498.

An "unlawful assembly" is the meeting of three or more persons, with intent to aid each other by violence, or in any other manner, either to commit an offence or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof.

If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation, or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding $500.

If the persons unlawfully assembled together do, or attempt to do, any illegal act, all those engaged in such illegal act are guilty of riot.

If any person, by engaging in a riot, shall prevent any other person from pursuing any labor, occupation, or employment,

cotting.[6] (Compare also statutes set forth in §§ 51, 52, 55.)

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or intimidate any other person from following his daily avocation, or interfere in any manner with the labor or employment of another, he shall be punished by confinement in the county jail not less than six months nor more than one year. Tex. P. C., 279, 289, 295, and 304.

The legislature of Louisiana, by a resolution July 12, 1894, condemned the efforts of foreign emissaries to disturb the public peace by fomenting discord between employers and employees at a time "when there is no cause for discontent, and no grievances to be redressed," and commended the railroad operatives of the state for repulsing the overtures of such agitators and refusing to join in the Chicago strike. La., 1894, 149.

[6] The orderly and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy. N. Y. P. C., 170; Minn., 6424.

And no conspiracy is punishable criminally unless it is one of those specifically enumerated (crime, felony, to commit or charge; and see note 5). Minn., 6423; Mon. P. C., 322 (see § 55).

No agreement except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement. N. J. Rev., p. 261, § 191; Minn., 6425; Mon. P. C., 323.

In New Jersey persons lawfully and peacefully persuading, advising, or encouraging other persons to enter into any combination for or against leaving or entering into the employment of other persons, are by the express statute declared not conspirators. N. J., p. 1296, § 9.

See also § 55 for Maryland and Montana laws.

§ 60. **Picketing.**—Patrolling or picketing may be defined to be the besetting of the works or place of business of an employer for the purpose of persuading or preventing men from taking work or customers to deal with him, or the following of his employees in the street for the purpose of inducing them to leave their employment; "picketing" being the usual English word, and "patrolling" the American for the same thing. It may be done by combination, so as to amount to a conspiracy or boycott, or consist merely in the individual cases, in which case the only question will be whether it amounts to illegal intimidation; and we may state at once that the law, both English and American, is pretty well settled down to the view that picketing, for the purpose of mere persuasion of workmen not to take employment, and not attended with any disorder or physical or moral intimidation, is now held legal; at least when conducted in a reasonable manner and with not too great a crowd. Indeed, the recent English decisions have gone so far as almost to prescribe that the picket of two persons, which may be relieved by others, like a guard, is about the extent to which the law will allow it; and these two persons must, of course, not be guilty of intimidation as above defined; but we must note that the law will be much more strict when the persons picketing are not in the

employ of the persons against whom they are acting; and, consequently, can have no direct personal object of bettering their own condition; and we may further venture to assert, though there is yet no reported case which makes the distinction, that a picket conducted for the purpose of preventing persons from trading with the employer is at least more likely to be illegal (if indeed it is not always illegal) than a picket established merely to see that other workmen do not take employment, or to persuade those who are still in the employment to leave.

There are quite a number of reported decisions on the precise point of picketing. Perhaps the first English case was that of Reg. *v.* Druitt, which we have more fully discussed in another connection.[1] It arose under the statute of 6 George IV., p. 129, and also 22 Victoria, chapter 34, section 1, of which enacted that "No workman or other person, etc., by reason merely of his entering into an agreement with any workman, etc., or by reason merely of his endeavoring peaceably and in a reasonable manner and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, etc., shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said act." But in spite of the statute of Victoria, it was held that if the picketing

[1] 10 Cox C. C., 592. See §§ 55 and 57.

amounted to a conspiracy to molest the employer in carrying on his business, it was an offence at common law, and also that the use of insulting expressions and gestures by the pickets to the non-union work-people amounted to intimidation, molestation, or obstruction, as these words were used in the statutes mentioned.

"'Picketing' done in a way to excite no reasonable alarm, and not to coerce or annoy those who were subject to it, would not be an offence. It was lawful for the defendants to endeavor to persuade persons who had not joined the union to do so, provided that persuasion did not take the shape of coercion and intimidation. But even if abusive language and gestures were not used, if the pickets were so placed or so acted, by watching the movements of the work-people and masters, or by black looks, or by any other annoyance, as in the judgment of the jury would be likely to have a deterring effect in the minds of ordinary persons, it would be 'molestation' and 'obstruction' against this statute."

It is noteworthy that in this case all the defendants were employees of the complainant, or at least were themselves employees of master-tailors in London, the complainant being the well-known tailor, Poole; and that other master-tailors in the same vicinity had been picketed by the same combination under the same trade dispute.

The next case was that of Reg. *v.* Shepherd.[2] There was no evidence whatever of any intimidation, or of anything done by the defendants, who were journeymen shoemakers, other than walking about the street in front of the complainant's factory and advising people not to take employment there, in a civil manner. This was clearly a case of lawful picketing, and the court so held.

In Reg. *v.* Hibbert,[3] on the other hand, where there was evidence that a large number of persons waylaid the workmen and warned them not to take employment, using opprobrious epithets, etc., the picketing was held unlawful.

Then came the case of Reg. *v.* Bauld,[4] which was an indictment against the defendants, not apparently employees of the complainant, to persuade his employees to quit work and to prevent others from taking employment. Baron Huddlestone, who was not, as it seems, familiar with the growth of the law upon the subject, in his charge to the jury, denied that picketing was lawful except for the purpose of obtaining information simply, or finding out whether the men on strike were secretly working, and not for the purpose of besetting the employer or persuading others not to work, and incidentally expressed

[2] 11 Cox C. C., 325. [3] 13 Cox C. C., 82.
[4] 13 Cox C. C., 283.

strong disapproval of picketing in general, hinting that it would almost certainly become illegal. This case, however, arose under the statute of Victoria of 1875,[5] which had a proviso that, "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." There is unquestionably a pretty clear inference that any other kind of watching or besetting would be illegal under the act, but there is no similar statute in any of the American states.

Then, under the same act, the case of Judge *v.* Bennett[6] arose, which is interesting as justifying what we said in discussing the law on strikes (§ 55), that a *threat to do* a thing may be illegal, the doing of which is legal enough. It was a case where the defendant, the secretary of a union of boot and shoe operatives, wrote a letter to the complainant, stating that unless she started all her shops, her shop would be picketed. All the picketing done was that of two men parading in turns before the front of the shop for three days in an orderly manner, and not personally interfering with the work-people. The court admitted that such picketing might be

[5] 38 and 39 Vic., Chap. 86, § 7.

[6] 36 W R., 103.

legal enough, but sustained a conviction of the defendant on the ground that the threat to picket, given in such terms as to make the employer afraid, was of itself a criminal offence.

The next English case on the subject of picketing is that of Reg. *v.* McKenzie, which occurred in 1892.[7] In this case the conviction was not sustained, on the ground that the indictment did not set out, as the statute required, "the acts with a view to compel the prosecutor to abstain from doing which the defendant followed the prosecutor," which is better law than grammar. The case is therefore only interesting from its facts. The complainant was the agent of a shipping federation, and the defendant an officer of a seamen's union, who led a large crowd of persons in a disorderly manner through the street. The court held that under the statute (38 & 39 Vic., C. 86) it was not an offence merely to follow a person through the street, although in a disorderly manner, but only to do so for the purpose of controlling his action in some unlawful riot.

But finally the cases of Gibson *v.* Lawson and Currau *v.* Treleaven seem to have licensed picketing generally; but they arose under the latest English statute,[8] which, as we have said, goes farther than the statutes as yet passed in this country.

[7] 67 L. T. R., N. S., 201.

[8] 17 Cox C. C., 354 *et seq.*

In this country there have been several important decisions on picketing, and the law may be said to be generally now where it was in England before the recent cases last mentioned. That is, the following or besetting workmen, or the picketing of factories or places of business, when accompanied by any violence or intimidation, or conducted in an unreasonable and turbulent manner, is unlawful, and will be enjoined; and it appears that such intimidation may be moral, as by the use of opprobrious epithets or ridicule.[9] In Sherry *v.* Perkins, decided in 1887, a bill was brought by Patrick Sherry, engaged in the shoe manufacturing business in Lynn, alleging that the Lasters' Protective Union, of which the defendants were president and secretary, respectively, called upon him on January 5th to inquire as to the wages he paid; that on January 8th certain lasters left the plaintiff's employment, giving as a reason therefor that they did not dare work for him further on account of the defendants; that in order to intimidate others from taking their places, and to prevent those who had left from going back, the defendants, with the assent of the association and out of its moneys, caused to be carried in front of

[9] State *v.* Stewart, 59 Vt., 272; Sherry *v.* Perkins, 147 Mass., 212; People *v.* Wilzig, 4 N. Y. Crim., 403; Holmes's Decision, Supreme Court of Massachusetts, reported Mass. Labor Annual, 1895; Murdock *v.* Walker, 152 Pa. St., 595.

Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's, per order L. P. U." The bill further alleged threats to the lasters if they continued in the plaintiff's employment, and general intimidation, and prayed that the defendants might be restrained from making such banners and causing them to be carried, and for further relief. The court held that such conduct was illegal at common law, and that it was a proper case for an injunction, being such a nuisance as a court of equity would grant relief against.

In Wilzig's case (see also § 58), the plaintiff was proprietor of a large saloon upon Fourteenth Street, New York, and members of certain labor unions desired him to discharge many workmen who had been long in his employ, they not being members of the union, and to pay wages at the union scale. Plaintiff refusing to do so, the defendants caused extensive picketing in front of plaintiff's shop, so that a crowd collected in the street. Opprobrious epithets, signs, and banners were used, and the plaintiff's business interfered with, though there was no actual physical violence. In this case the court held clearly that intimidation might consist in mere ridicule or disorder, or any such conduct as would prevent the weak or gentle from trading with the

plaintiff, and defendants were convicted in a criminal action for conspiracy.

The case decided by Mr. Justice Holmes in Massachusetts, in the spring of 1895 (reported in Mass. Labor Annual, 1895), is somewhat similar to this on the facts, so that the line between legal and illegal picketing must be clearly drawn between those two cases. In the Boston case, while several of the defendants paraded the street in front of the plaintiff's shop, it did not appear that they interfered in any way with the plaintiff's customers, and they were, in fact, themselves the previous employees of the plaintiff, but had struck for higher wages. In neither case was there any physical violence. The cases are, therefore, instructive, as tending to establish the principle we have contended for in § 57 above, that a conspiracy or combination of the plaintiff's employees, having a legitimate motive, may be lawful when a conspiracy of outsiders is not; and also, that a combination of workmen merely to persuade other employees of the plaintiff not to work, or not to take work with them, may be sustained, when a conspiracy to persuade the plaintiff's customers not to deal with him will not be, the latter being more evidently a case of boycott.

With the exception of this unreported case, the latest American case on picketing is the Pennsylvania case of Murdock *v.* Walker, where the

facts consisted in the following of plaintiff's employees to their homes, and the besetting both the factory and their lodging-places. There was no physical violence or actual threats, but some ridicule and opprobrious epithets were used. The opinion of the court announces clearly the principle that a court of equity will enjoin even discharged employees—they were, in fact, members of the labor union—from gathering about the plaintiff's place of business, and from following his employees to and from work, and from gathering about their boarding-places, and from any and all manner of threats, intimidation, *ridicule*, and *annoyance;* and to the same effect see the case of the Wick China Co. *v.* Brown,[10] decided in New Jersey in 1894, where an injunction was granted against members of a union from combining to prevent, by threats, following, and ridicule, the plaintiff's employees from working.

We conclude that in the United States to-day only the most reasonable and peaceable picketing, for mere purposes of information and observation, is lawful, and only quiet and peaceable persuasion, by workmen of workmen, and conducted in such a way as not to amount to an elaborate conspiracy to prevent the plaintiff from getting help; though it is not probably

[10] 30 Atl., 261.

necessary to render such action lawful that the persons doing it should be actually employees of the plaintiff; if they are members of the labor union concerned or engaged in the trade, so as to have a solidarity of interest, that will be sufficient; but picketing for the purpose of interfering with the plaintiff's trade, as by driving away his customers, is never lawful.

§ 61. **Blacklisting.** The blacklisting of employees does not, of course, mean the making a list of employees, against whom the employer has a complaint, for his personal and private use; but the exchanging of such lists with other employers for the purpose of preventing them from employing such employees; or the advising them not to employ men who have been discharged by the person giving the advice. It is possible that blacklisting might be carried to such an extent as to be an unlawful combination under the common law; but it is doubtful whether the facts would ever sufficiently sustain an indictment for combining to injure any definite person. So-called "characters" given to employees and servants are usually held privileged communications when unfavorable, unless, of course, they are false or malicious, in which case they fall under the head of libel. But a few states have recently passed statutes forbidding blacklisting. Thus, in North Dakota, the ex-

change of blacklists between corporations is prohibited by the constitution,[1] and statutes of Iowa, Indiana, Wisconsin, Alabama, Virginia, Montana, and Georgia (in Georgia the law applies only to corporations) make it a penal offence wilfully to prevent discharged employees from obtaining a new situation,[2] and the employee is to be furnished with the cause of his discharge;[3] but a truthful statement of the reason for such discharge may be furnished other employers;[4] while in Iowa, Missouri, Montana, Georgia, and Colorado blacklists are specially prohibited *eo nomine*.[5] So, in Indiana, Georgia, and Montana there is a law requiring an employer discharging an employee to furnish him with a written statement of the cause, failing which he may not blacklist the employee; provided, that such statement shall not, in Georgia and in Indiana, be used as the cause for an action of slander or libel. In Wisconsin, combinations of employers to prevent any person from obtaining employment, either by threats, promises, or by circulating blacklists, or by any

[1] 1 N. D. Const., § 212.

[2] Ind., 7076; Iowa, 1888, 57; Mon. Pol. C., 3390; Wis., 1895, 240, 246; Ga., 1891, p. 183; 1895, 321; Col., 1887, p. 58; Va., 1892; Ala., 1895, 321.

[3] Ind., Mon., Ga. This latter part of the statute was declared unconstitutional in Georgia. See note 9 below.

[4] Ind., Io., Wis., Va.; Mon. Pol. C. 3392.

[5] Mo., 1891, p. 122; Io., Mon., Col., Ga., *ib.*

means whatsoever, or for the purpose of so procuring his discharge, are made a misdemeanor. And corporations or partnerships allowing blacklisting by their agents or otherwise are sometimes made liable to the employee in exemplary damages,[6] and railroads in treble damages.[7]

There is a very early reported case, disclosing a blacklist, in Massachusetts,[8] though its legality was not decided. It was a case where one employer sued another in tort for enticing workmen from his service, and an agreement of several employers, including the plaintiff and defendant, not to employ workmen while in the service of either of the others, unless such workmen first procured a written discharge, and that each party should keep the others advised of the names of the workmen in his employment, was offered in evidence. This was, of course, a typical blacklist. The defendants objected to it on the ground that it was a contract and not evidence of any act of the defendants in an action of tort, and the document was excluded ; but neither court nor counsel say anything in doubt of its validity.

But the statute itself, when applying only to corporations, has been held unconstitutional in one state.[9]

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[6] Ind., 1895, 110, 7076; Mon., 3391; Ga., *ib.*

[7] Io., Ga., *ib.*

[8] Boston Glass Manufactory *v.* Binney, 4 Pick., 425.

[9] Wallace *v.* Georgia C. & N. Ry. Co., 22 S E., 579. This

§ 62. **Special Laws Concerning Railroad Employees, etc.**—Many states have recent statutes

was an action based on Georgia Statutes, 1891, p. 188, declaring that defendant had employed plaintiff as car inspector, July 9, 1892, and discharged him on August 12th; that on August 18th he made a written request of the company to give him a specific statement in writing of the reasons which had caused his discharge; that he had waited for more than twenty days, during which time defendant had refused or failed so to do, whereupon it became liable to him in the sum of $5,000, under the statute referred to. The city court of Atlanta gave judgment dismissing the action. The opinion of the Supreme Court of Georgia appears in two words: "Judgment affirmed." But the Reporter prints the head note called a "Syllabus by the Court" in the following words:

"1. The public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employees and their late employers, designed, not for public but for private information, as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced or suggested them. A statute which undertakes to make it the duty of incorporated railroads, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employees, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory

expressly forbidding, or limiting, strikes upon railroads.[1]

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private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law.

"2. It follows from the foregoing that the act of October 21, 1891, entitled 'An act to require certain corporations to give to their discharged employees or agents the cause of their removal or discharge, when discharged or removed,' is unconstitutional, and that an action founded thereon for the recovery of $5,000 as penalty or arbitrary damages fixed by the statute for non-compliance with its mandate cannot be supported."

[1] In Maine and New Jersey : Any employee of a railroad corporation who, in pursuance of an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a dispute between such corporation and its employees, unlawfully, or in violation of his duty or contract, stops, or unnecessarily delays, or abandons, or in any way injures, a locomotive, or any car, or train of cars on the railway track of such corporation, or in any way hinders, or obstructs the use of any locomotive, car, or train of cars on the railroad of such corporation, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the state prison, or in jail, not exceeding one year (Me., 123, 6). So substantially in New Jersey, the penalty being $500, or six months (N. J. Rev., 1877, p. 946, § 173, 175).

Whoever by any unlawful act, or wilful omission or neglect, obstructs or causes to be obstructed any engine, or car, or aids therein, or who, having charge of any locomotive . . . or car, wilfully stops, leaves, or abandons it, or renders, or aids in rendering it unfit for, or incapable of immediate use, with intent thereby to hinder, delay, obstruct, or injure the management and operation of the railroad, or the business of

§ 63. **Pinkerton Men, Etc.**—By the constitution of Wyoming no armed police force or detective

the company, is liable to a fine of one thousand dollars, or imprisonment for two years. Me., 123, 7.

So, substantially in Connecticut and New Jersey, the penalty is $100 or six months, and $500 or six months, respectively (Ct., 1517; N. J., *ib.*, 174) ; and whoever, having any management of a railroad locomotive or car, while in use, is guilty of gross negligence or neglect, or maliciously stops or delays the same, or abstracts therefrom the tools or appliances, may be punished by fine and imprisonment for three years (Me., 123, 8).

Whoever, alone or in combination, does, or procures to be done, any act, in contemplation or furtherance of a dispute between a railroad, gas, or telegraph company and its employees, wrongfully and without legal authority, uses violence toward, or intimidates any person with intent thereby to compel such person to do, or abstain from doing, any lawful act, or who, on the premises of the corporation, by bribery or in any manner induces, or tries to induce, such person to leave the employment with intent thereby to further the objects of such combination, or in any way interferes with such person while in the performance of his duty, or threatens, or persistently follows such person in a disorderly manner, or injures, or threatens to injure his property, with either of said intents, is punishable by fine of three hundred dollars, or imprisonment for three months. Me., 123, 9.

Any employee of a railroad who, in furtherance of the interests of either party to a dispute between another railroad and its employees, refuses to aid in moving the cars of such other railroad or trains, in whole or in part made up of such cars, over the tracks of the corporation employing him ; or refuses to aid in loading or discharging such cars, is punished by imprisonment for one year, or fine of five hundred dollars. Me., 123, 10.

agency, armed body or unarmed body of men, shall ever be brought into this state for the

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And in New Jersey, if any person in aid or furtherance of the objects of any strike obstruct any railroad track, or injure or destroy rolling stock, or other property of the railroad, or take possession of, or remove it, or prevent or attempt to prevent the use thereof by the company or its employees, or by offer of recompense induce any employee to leave the service of the railroad while in transit, such person is guilty of a misdemeanor, and punishable by fine of five hundred dollars and imprisonment for one year. N. J. Rev., 1877, page 946, s. 176.

And in Pennsylvania, Delaware, Illinois, and Kansas: If any engineer or railroad employee engaged in a strike, or with a view to incite others to such strike, or in furtherance of any combination or preconcerted arrangement with any other person to bring about a strike, abandons the engine in his charge attached to either a passenger or freight train, at any other place than its destination, or refuses or neglects to proceed to its destination with the train, he is guilty of a misdemeanor—penalty five hundred dollars or six months (Pa. Dig., p. 533, § 35; Del., Vol. 15, 481, 1); one hundred dollars or ninety days (Ill., 114, 108; Kan., 2480).

So, if such engineer or employee, for the purpose of furthering the object of, or lending aid to, any strike organized or attempted on any other road, refuses or neglects to remove cars, etc., of such road, or interferes with, molests, or obstructs any engineer or employee in the discharge of his duty, or obstructs any track, or injures or destroys rolling stock, or other property of a railroad, or takes possession of or removes such property, or prevents or attempts to prevent its use by the railway. Del., *ib.*, 2-4; Pa. Dig., p. 533, §§ 358–360; Del., Vol. 15, 481, 2 and 5.

In Illinois, Michigan, and Kansas, if any person or persons shall wilfully and maliciously, by any act, or by means of intimidation, impede or obstruct, except by due process

suppression of domestic violence, except upon the application of the legislature, or executive

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of law, the regular operation and conduct of the business of any railroad company, *or other corporation, firm, or individual in this State*, or of the regular running of any locomotive engine, freight or passenger train of any such company, *or the labor and business of any such corporation, firm, or individual*, he or they shall, on conviction thereof, be punished by a fine of not less than twenty dollars, nor less (more) than two hundred dollars, and confined in the county jail not more (less) than twenty days, nor more than ninety days, etc. Ill., 114, 109 ; Kan., 2481 ; Mich., 9274.

If two or more persons shall wilfully and maliciously combine, or conspire together to obstruct, or impede by any act, or by means of intimidation, the regular operation and conduct of the business of any railroad company *or any other corporation, firm, or individual in this State*, or to impede, hinder, or obstruct, except by due process of law, the regular running of any locomotive engine, freight or passenger train, on any railroad, *or the labor, or business of any such corporation, firm, or individual*, such person shall, on conviction thereof, be punished by fine not less than twenty dollars, nor more than two hundred dollars, and confined in the county jail not less than twenty days, nor more than ninety days, etc. (Ill., 114, 110 ; Kan., 2482); Mich., 9275.

This act shall not be construed to apply to cases of persons voluntarily quitting the employment of any railroad company, or such other corporation, firm, or individual, whether by concert of action or otherwise, except as is above provided. Ill., 114, 111 ; Mich., 9276 ; Kan., 2483.

In Wisconsin, any person who shall individually, or in association with others, wilfully injure or remove any part of a railroad car, locomotive, or of any stationary engine, or other implement or machinery, for the purpose of destroying it, or preventing its useful operation, or who shall in any other way interfere with the running or operation of any locomotive

when the legislature cannot be convened.[1] It may be queried if this provision is consistent with the national constitution. In Missouri, also, there is a new statute on the subject; and it is "unlawful for any person or persons, company, association, or corporation to bring or import into this state any person or persons, or association of persons, for the purpose of discharging the duties devolving upon the police

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or machinery, shall be punished by fine up to one thousand dollars, or imprisonment for two years, or both. Wis., 1887, 427, 2.

In Texas any person or persons who shall, by force, threats, or intimidation of any kind whatever, against any railroad engineer or engineers, or any conductor, brakeman, or other officer or employee employed or engaged in running any passenger train, freight train, or construction train, running upon any railroad in this State, prevent the moving or running of said passenger, freight, or construction train, shall be deemed guilty of an offence, etc. Tex., 1887, 92, 1.

In Louisiana, any person who may ship upon a steamboat in the customary manner, to do service on said boat, either by the month or voyage, in the capacity of an officer, engineer, pilot, clerk, mate, carpenter, cook, steward, cabin-boy, watchman, fireman, deck-hand, or laborer, who may abandon the boat before having fulfilled his engagements, or who may refuse to do his duty in the capacity for which he shipped or engaged to perform, before the completion of the voyage, or the term of his engagement, without lawful cause, shall, besides forfeiting all claims to the wages due for such service, be liable to the owner or owners of said steamer for any damages which they may sustain by said abandonment or refusal to do duty. La. R. L., 945.

[1] Wy. Const., Art. 19, 1.

officers, sheriffs, or constables, in the protection or preservation of public or private property.

"Hereafter no sheriff in this state shall appoint any under sheriff or deputy sheriff, except the person so appointed shall be, at the time of his appointment, a *bona-fide* resident of the state.

"The mayor, chief of police, and members of the board of police commissioners of any city in this state shall be governed by the same restrictions and subject to the same penalties as a sheriff of any county, under the provisions of this article.

"Any person or persons violating any of these provisions shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years; and if any company, association, or corporation shall be guilty of violating this article, said company, association, or corporation shall be punished by a fine of not less than one thousand dollars."[2]

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[2] Mo., 3772–3775.

CHAPTER IX

EQUITY PROCESS AND INJUNCTIONS — THE ANTI-TRUST LAW, AND THE INTERSTATE COMMERCE LAW

§ 64. **Remedies by Injunction.**—We have shown in Chapter VIII. that a strike may occasionally be an unlawful conspiracy or a criminal conspiracy, while a boycott is so generally. It may be questioned whether there is, logically, any difference between an unlawful conspiracy, or one which subjects its members to liability to damages at suit of persons actually injured, and a criminal conspiracy. The act of an individual to the prejudice of a third person will very frequently render him liable to damages without being criminal, as, for instance, in the amusing case of Tarleton *v.* McGawley,[1] where the master of a ship was held liable in damages to the owner of another ship, both being traders off the coast

[1] Peak N. P. C., 270. See § 5 above. So in the recent case of Graham *v.* St. Charles Street Ry. Co. and Newman, it was held that damages might be recovered of Newman personally, the foreman of the Street Railway Company, for instructing his men not to frequent the plaintiff's store under penalty of discharge, etc. 47 La. Ann., 214; 27 L. R. A., 416.

of Africa, for purposely firing a cannon and so scaring the negroes on the beach that they ran away and did not trade with the other vessel. Obviously there was nothing criminal about this act, but it will be remembered (see § 55) that a combination of many for the specific purpose of injuring a third person is a criminal conspiracy, the reason of it being that the confederation of many becomes so dangerous to the state that it is a public wrong, *i.e.*, a crime. Nevertheless, there is no doubt the courts have been more strict in applying the doctrines of conspiracy upon an indictment than in a civil suit brought by a person injured to recover damages. Logically, every combination which is so unlawful as to make the parties liable for damages for the combination itself, and not for the acts they commit, is necessarily a criminal conspiracy; but, practically, the courts, and particularly the juries, will require much more definite evidence of an unlawful purpose in the first place, and of acts more seriously unlawful in the second place, if the parties to it are brought before the court for punishment as criminals.

In the ordinary cases, therefore, it is more difficult for persons injured by a boycott, blacklist, or conspiracy, whether employers or employees, to get redress in the criminal courts, while it very frequently happens that the de-

fendants are not responsible for any damages, as a judgment could not be collected against them. Moreover, in nearly all these cases, an action for damages against any one or more persons would be wholly inadequate, partly because the fraction of the wrong done by any particular person would be trifling, but more because the action of trade or industrial conspiracies, disorderly strikes, and boycotts is to work a damage which is irreparable after it has happened, besides being threatened or committed by such an indefinite number of persons that remedies by suits at law are quite useless.

This brings us to the third remedy against unlawful combinations, which has become by far the most important of all, the most effective in execution, and the most liable to abuse. This is the remedy given in courts of equity by injunction; for under the procedure of equity courts a person apprehending injury by such combinations may bring a bill against one or more persons, and obtain at once, without waiting for any hearing or answer by the defendant, a preliminary injunction, addressed against not only the defendants named,[2] but all their agents, servants, and subordinates named or unnamed; and, finally, against any person whatever throughout the world who may have knowledge

[2] *Ex parte* Lennon, 64 F. R., 320.

that such injunction has been granted; so that by widely publishing such injunction orders, posting them on fences, in workrooms and factories, or on railroad cars, it becomes not a difficult matter to render all the world liable to the summary jurisdiction of contempt if they interfere with the property or rights protected by the injunction. Such a preliminary injunction if not vacated may be confirmed after hearing on the merits, and made permanent, with the same permanent results. Moreover, the process which courts of equity have of enforcing their judgments or decrees is far more effective than any known to the common-law courts. The common-law courts can only mulct a man in damages, and, if he refuse to pay, may, under certain strict limitations, and with very great trouble and delay, occasionally, in rare instances, imprison a man for the debt; but when a decree is rendered in a court of equity, any party to the suit, or when an injunction is granted, any party who may have notice of the injunction, is liable to contempt process, if he do or suffer to be done any act against the decree or the injunction only; and contempt process is a very effective one, consisting as it does in the immediate and summary punishment of the offender by fine, or more usually by imprisonment until he obey the orders of the court. It is unquestioned law that the offender in cases of contempt is entitled to

no jury trial.[3] It is also law generally unquestioned that from an order in contempt there is no appeal from the court issuing it to any higher court,[4] although in a few jurisdictions it has been held that there is an appeal in cases where the injunction was issued in reality to protect private interests and not the public;[5] but even this appeal only goes so far as to give the appeal court the right to investigate and see whether the court below had jurisdiction of the subject matter.[6] The moment this is found to be the case, the appeal court even cannot go into the rights and wrongs of the injunction or the reasonableness of the punishment. In Montana and one or two other states, by statute, the person in contempt process may take the matter up by writ of *certiorari*,[7] but it is doubtful whether this right goes further than to test the jurisdiction of the court; and in the same way perhaps the person committed for contempt may have a right of *habeas corpus*, but with the same result, as was decided recently by the United States Supreme Court in the Debs case, where, although the

[3] Bellows *v.* Bellows, 58 N. H., 60; Garrigus *v.* State, 93 Ind., 239; McDonnell *v.* Henderson, 38 N. W., 562; Eillenbecker *v.* Plymouth Co., 134 U. S., 31.

[4] Campbell *v.* Shotwell, 3 Wkly. L. B., 433; Williamstown *v.* Darge, 71 Wis., 643.

[5] Dodd *v.* Una, 13 Stew. (N. J.), 672.

[6] Re Wood, 82 Mich., 75.

[7] State *v.* 4th Jud. Dist. Court, 34 Pac. R., 39.

court in their opinion intentionally took a somewhat broader ground, the real reason of their decision was but the fact that the Federal Circuit Court, which issued the original injunction, had jurisdiction and authority to do so under ordinary equity doctrines.

It is frequently said that this use of the injunction to prevent conspiracies or combinations of organized labor, rights, or injuries to property or personal rights by masses of men is of modern application, and it is traced back to the leading case of Springhead Spinning Co. *v.* Riley,[8] which was decided as late as 1868. This is not, however, a new doctrine, but rather the revival of a very old one. In the fourteenth century, at the time of the civil wars and great disorders in England, Edward III. found it necessary to adopt some more effectual measures of police than those which already existed. For this purpose justices of the peace were first instituted throughout the country with power to take security for the peace and bind over parties who threatened offence. Fifty years later, in the reign of Richard II., it was found necessary to provide further measures for repressing forcible entries on lands, the lawless spirit of the times making it necessary, and thereupon the king's chancellor began to exercise his authority in

[8] L. R. 6 Eq., 551.

repressing disorderly obstructions to the course of law, and in affording civil remedy in cases of outrage, which for any reason could not be effectually redressed through the ordinary tribunals. The Court of Star Chamber had the same jurisdiction, and Coke particularly mentions as part of it the suppression of those who spread false and dangerous rumors of frauds, deceits, conspiracies, and of great and horrible riots, routs and unlawful assemblies, leaving ordinary offences to the courts of law, and speaks of it complainingly as "a court of criminal equity."[9]

All equity jurisdiction was adopted and recognized with great reluctance in the original states of this country. In Massachusetts it took a succession of statutes, after repeated opposition, to establish the present system of equity jurisdiction; and there are many states in which the equity jurisdiction is not yet as full as that of the English Court of Chancery, although in the federal courts it is made expressly the same. Nevertheless, in view of the great recent criticism of the use of this jurisdiction by federal courts in the issue of injunctions in cases of labor troubles, it is a striking fact that the very first case decided by the United States

[9] Spence, Eq. Jurisdiction, pp. 342-344; Charles Claflin Allen, article on "Injunction and Organized Labor," 17 Amer. Bar Assn. Rep., 299; Pol. Sci. Quarterly, Vol. 10, No. 2: "The Modern Use of Injunctions," by F. J. Stimson, p. 189.

Supreme Court was an equity case in which an injunction was granted.[10] The case of the Springhead Spinning Co., mentioned above, was, perhaps, the first case of the use of the injunction in a modern labor dispute. In that case the defendants were officers of a trades-union, and they gave notice to workmen, by placards, etc., that they were not to take work with the plaintiff, and the bill alleged that this intimidated the workmen and injured the value of the plaintiff's property. On demurrer it was held that although the acts of the defendant as alleged amounted to a crime (under the then existing statute), the court would interfere by injunction to restrain such acts, inasmuch as they were also an infringement of property rights. Malins, V.-C., reaffirmed the doctrine that a court of chancery would not enjoin the commission of crimes as such, and that the function of equity is to protect the civil right of property; and quoted the case of the Emperor of Austria *v.* Kossuth,[11] in which case the injunction against the manufacture of counterfeit Austrian money by Kossuth in England was granted on the ground that it was an invasion of property rights of the Emperor of Austria, but expressly not granted in so far as such counterfeiting consti-

[10] Georgia *v.* Brailsford, 2 Dallas, 402.

[11] 3 De G. F. & J., pp. 232–253.

tuted a crime in the English law; and also quoted Lord Eldon,[12] "A court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his possession."[13] So Vice-Chancellor Malins concluded that while the "jurisdiction of a court of equity is to protect property, it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or make it less valuable or comfortable for use or occupation." There were in England comparatively few other

[12] Macauley *v.* Shackell, 1 Bligh, N. S., 96, 127.

[13] In Sparhawk *v.* Union Passenger R.R., Pa. St. Rep., the bill was brought by citizens to prevent defendant from running its cars on Sunday in violation of a penal statute; and the court held that it was incumbent upon plaintiffs to show that the illegal acts of defendants interfered injuriously with their property rights. A court of equity "will not enforce a penalty or enjoin against the commission of a crime when it is merely a crime, and not also an injury to private rights of property. When an act is both a public offence and a private wrong it may be enjoined against, but not otherwise. 'If an act be illegal,' said Vice-Chancellor Kindesley, in Solteau *v.* De Held, 2 Sim & Stew, 153, 'I am not to grant an injunction to restrain an illegal act merely because it is illegal. I cannot grant an injunction to restrain a man from smuggling, which is an illegal act,' nor could he for any merely criminal or penal offence."

cases of injunctions sought in labor disputes until recent years, the remedy followed being commonly that of indictment of the persons offending. But the case of the Mogul Steamship Co., discussed in § 57, while refusing to consider the combination an unlawful boycott, recognized that an injunction would have been a proper remedy had it been so. And in the United States the peculiar remedy of process for contempt in labor disputes was first used in cases of actions against receivers, which will be discussed in the next section.

In Walker *v.* Cronin, discussed in § 58 above, and decided in 1871, although the remedy sought was an action for tort, it appears probable that an injunction would have been awarded had it been applied for; and the same may be said of Old Dominion Steamship Co. *v.* McKenna, decided in 1887.

But apparently the first American case where an injunction was granted to prevent anything resembling a boycott is the Massachusetts case of Sherry *v.* Perkins, decided in 1888, and the Pennsylvania case of Brace *v.* Evans, decided independently in the same month, both fully discussed in §§ 58, 60, above. In both these cases an injunction was granted. Other important cases of injunctions rapidly followed, the first in a federal court being that of Casey *v.* Cincinnati Typographical Union, where an injunction

was granted upon a state of facts resembling that of the Springhead case.[14] Several other cases, which are fully discussed in §§ 58, 65, 66, rapidly followed.[15]

In the Toledo Railway case a bill in equity was brought by the plaintiff railroad against the Pennsylvania Railroad and others to enjoin the receivers from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. The injunction was issued, served upon the Lake Shore Railroad, and brought to the notice of its employees by publication, and certain of its employees were attached for contempt for violating the injunction, among them one Lennon, an engineer, who was on his run from Detroit to Air Line Junction, where he was ordered to take an empty car from the Ann Arbor "Y." This was one of the boycotted cars, and he refused to switch the car into the train, and held it there for five hours, until he received a message from the chairman of the strikers which read, "You can come along and handle Ann Arbor cars." Although he said in the morning "I quit," he brought his train to its destination, which the court held to be

[14] 45 F. R., 135. See § 58.

[15] Blindell *v.* Hagan, 54 F. R., 40 (see § 66); Toledo Ry. Co. *v.* Penn. Ry. Co., 54 F. R., 746; United States *v.* Workingmen's Amalgamated Council of New Orleans, 54 F. R., 994.

satisfactory evidence that he did not quit in good faith, but intended to continue in the company's service, and that his conduct was a trick to avoid obeying the order of the court. Lennon was accordingly fined fifty dollars. (For a fuller report of this case see also § 66 below.)

In the United States *v.* Workingmen's Council of New Orleans (see § 58) it appeared that a difference had sprung up between the warehousemen and their employees, and the principal draymen and their subordinates, and with a view of compelling an acquiescence on the part of the employers, it was brought about by the unemployed that all union men should discontinue business, with the usual consequence of disorder and cessation of business. The case was based on the Interstate Commerce Law, but an injunction was granted, the terms of which do not appear in the report, except that it restrained the defendants from interfering with interstate commerce.

So, in Pettibone *v.* United States,[16] an injunction was granted against defendants for interfering with a mining company, or by force or threats, or otherwise making an attempt to intimidate an employee or any other person from taking service with the company. Shortly before this a similar case had been decided—that

[16] 148 U. S., 197. See §§ 55, 58 above.

of Cœur d'Alene Mining Co. *v.* Miners' Union of Wardner.[17] In this case it appeared that the defendants, members of miners' unions, combined for the purpose of not only controlling and dictating the wages to be paid them, but also to prevent all persons not members of such unions from working for the complainant. That they adopted a systematic course of intimidation against the complainant and any miners desiring to work for it who were not members of such unions; that they notified the complainant that it must employ none but those who belonged to such unions, and that they entered complainant's mines and by force removed therefrom its employees, and by reason of the premises the complainant was compelled to cease work; that one hundred men, headed by defendant, John Tobin, went to complainant's mine and forcibly ejected certain persons from work, and then took them to the Union Hall at Burke, where it was demanded they should join the union or leave the camp; and upon their refusal to do so it was ordered by the meeting that they be marched out of the state, whereupon they were escorted in the direction of Thompson Falls, Montana, by two hundred men, who beat oil-cans in imitation of drums; that they were called "scabs," and coarse indignities heaped

[17] 51 F. R., 260. See also in § 65.

upon them; they were denied the privilege of purchasing food, and for two days were without any food and exposed to the inclemency of the weather in crossing a snowy range of mountains. (It does not appear in the report, but this was in fact followed by the massacre of many of these non-union miners, well described by Mary Hallock Foote in her novel.) The court fully considered the argument that equity would not interfere to prevent the commission of a crime, and admitted that the court would not interfere merely to prevent a libel; but "when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with him, or laborers from working for him, the courts have, with nearly equal unanimity, interposed by injunction." It appeared that the injunction was served upon two proprietors of newspapers, and, while upholding the freedom of the press, the court held that if they were engaged in doing the acts complained of, or threatened to commit them by the use of their columns to incite the lawless or thoughtless to acts of violence or crime, the injunction against them also was well granted.[18]

[18] A New York court has held otherwise on similar facts: Rogers *v.* Evarts, 17 N. Y. Sup., 266. There is, of course, no doubt that fair comment, even sympathetic editorials, is

The Northern Pacific Railroad Company cases were fully discussed in §§ 55 and 58 above.[19] The petition was brought by the receiver of a railroad, and the court granted an injunction against employees and others from intimidating or persuading other employees to strike, or from combining to strike themselves, in such a manner as to cripple the railroad. This injunction was afterward modified on appeal, so that the injunction against persuading others, and the injunction against so leaving employment *themselves* as to cripple the railroad, were omitted.

In Lake Erie and Western Railroad Co. *v.* Bailey,[20] a railway not in the hands of a receiver filed its bill against defendant employees and members of unions to restrain them from obstructing and interfering with the movements of its trains, and the injunction was granted against all force and intimidation, reserving to the laborers only the right to quit work themselves, or to organize for the purpose of quitting work if they so chose.

In 1894 the case of Lennon, mentioned above, came before the Circuit Court of Appeals on his application for a *habeas corpus*. The court

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permissible to newspapers, provided they do not actually counsel a boycott or illegal acts of intimidation, etc.

[19] Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. Co., 60 F. R., 803; Arthur *v.* Oakes, 63 F. R., 310.

[20] 61 F. R., 494.

found that *habeas corpus* does not perform the office of a writ of error or an appeal in respect to the proceedings complained of, and that nothing is open to the court considering it but the jurisdiction of the court below, whether it had proper jurisdiction of the subject-matter and of the person. They also held, specifically, that it is not necessary, in order that a person should be bound to obey an injunction restraining a party to a suit, his agents, etc., from doing any act, that such person should himself be a party to the suit, or should be served with a copy of the injunction order, but that it is sufficient, if being such agent, he has actual notice that the order is being made.[21]

The same thing has recently been held by the Supreme Court of the United States on appeal from the Debs case,[22] decided in the Circuit Court in December, 1894, and this case is the leading recent authority for the old position, that though the same act constitute a contempt and a crime, the contempt may be tried and punished by a court of equity without regard to the criminal remedy; and it has often been held that although an act has been specially made a crime, or misdemeanor, or public nuisance, the fact that it is also an injury to private rights or prop-

[21] *Ex parte* Lennon, 64 F. R., 320.

[22] U. S. *v.* Debs, 64 F. R., 724; 158 U. S., 564.

erty, or a private nuisance, will enable the person injured to bring a bill against the parties committing it, or threatening to commit it, for an injunction.

§ 65. **Strikes against Receivers.**—Under the established doctrine of courts of equity a receiver appointed to take charge of property or prevent waste is the officer of the court. It follows that any interference with his possession is an interference with the possession of the court, and hence a contempt; and it will be a contempt independent of any injunction or any express words of the order appointing the receiver; although it is very common, particularly in modern times, to couple with the order appointing a receiver an injunction against all persons (or at least against all parties to the suit, their agents and privies) from interfering with the property in suit or with the possession of the receiver.

This doctrine has become very important in recent years, owing to the great extension of receivership jurisdiction by courts of equity over insolvent corporations, particularly railroads; and as nearly all railroads are situated in more than one state (or at least present in cases of insolvency an opportunity for invoking the jurisdiction of the federal courts owing to the different citizenship of the parties), the greatest ex-

tension of the control of railroads by courts of equity has occurred in the federal courts. In recent years more than one-third of the entire railroad mileage of the United States has been in the hands of receivers, nearly always appointed by the federal courts —that is, they have been run by receivers as officers of the courts— and any interference with their possession, or even with the traffic and management of the railway has rendered the guilty parties liable to the injunctions or contempt process of the court appointing the receiver. This, perhaps, has been the principal cause of what has become to be known as government by injunction; that is, the management of the railway interests of the country by officers of the federal courts under the control of equity process with its affirmative remedies before adverted to, which make it possible, by simple court order, to require all railroad employees, and even labor organizations affiliated with them, to perform the duties of their service in full under penalty of contempt.

Many such cases have been discussed in the last section and in § 55, Strikes, and §§ 57, 58, Boycotts; and it remains but to mention a few of the decisions on simple cases of strikes against receivers to show the nature and extent of the jurisdiction. Thus, in *re* Doolittle and another, strikers,[1] the Wabash Railway being in

[1] 23 F. R., 544. See also § 55.

the hands of receivers, the United States Marshal reported to the court that at Hannibal, Mo., he found the possession and use of the property interfered with by bodies of men, who spiked and blocked the tracks, drew water from the engines, and incited the agents and employees of the receivers to quit work; and that, in particular, Doolittle had prevented a train-master from taking out of a round-house a number of engines in the custody of the receivers, whereupon he had caused him to be arrested, and also arrested one Schanbacher for holding an engine upon and for the purpose of blocking the main track. As a result the movement of the engine and about one hundred freight-cars was delayed some hours, and the two prisoners were attached for contempt. It appeared that the strikers were engaged in a strike not against the Wabash, but against the Union Pacific Railroad, and Justice Brewer (now of the Supreme Court) ruled that although the defendants did not set out to obstruct the receivers of the Wabash Railroad, yet they did set out to obstruct some persons in the exercise of their legal rights, and interfered with other persons working, and prevented the owners of railroad trains from moving them; and the defendants were accordingly sentenced to sixty days' imprisonment.

In the same year (1885) four persons were attached for interfering with the receivers in pos-

session of a railroad in Colorado, and three of them were sentenced by Justice Brewer to imprisonment for ten days, thirty days, and four months respectively.[2] The facts do not clearly appear from the report, but there was a strike in progress and a large and excited crowd bent on stopping the movement of the trains, although they did not seek to destroy property; but they made the demonstrations with an attempt to overawe the engineers and their trainmen. Murphy, not being a leader in the disturbance, was sentenced to only ten days; Tyler, who had talked more freely, to thirty days; and Orr, who was proved to have made definite threats, to four months.

The next case was that of the Wabash Railway Co.,[3] in which it appeared that one Berry sent letters to the foreman of one of the railway shops, dated "Office of Local Committee," and saying: "You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees, but in no case are you to consider this an intimidation. C. M. Berry, Chairman." The railway was in the hands of a receiver, and the object of the strikers was to resist a reduction of wages; and

[2] U. S. *v.* Kane, 23 F. R., 748. See also in § 55.
[3] 24 F. R., 217.

it appeared that in consequence of these letters the men engaged in the shops quitted work. One of the locomotive engineers also testified that three partially masked men approached him on his engine and used violent and threatening language. It was held that Berry was guilty of interference with the operation of the railroad, and, on the sole ground that it was in the hands of a receiver, was guilty of contempt of court. He was accordingly sentenced to imprisonment for two months.

In the case of Higgins,[4] decided by Judge Pardee, in Texas, in 1886, first appears (besides the ordinary proposition that whoever interferes with property in the possession of a receiver is guilty of contempt) the proposition, destined to awake still wider discussion (see the Northern Pacific Railway case discussed in § 55), that while the employees of receivers, although *pro hac vice* officers of the court, may quit their employment, as can employees of private parties, they cannot so quit as intentionally thereby to disable the property, nor combine nor conspire to quit with or without notice with the object and intent of crippling the property and its operation. Orders had been issued from a secret organization to all their employees to quit work, whereby they did quit, and delayed the operation of the

[4] 27 F. R., 443.

railway, and this action was declared a gross contempt of court. Judge Pardee found that the real reason of the strike was to compel recognition of the secret labor organization as an existing power, so that its officers shall be consulted in the operation of a railroad of which they were not even employees; and declared "that this intolerable conduct goes beyond criminal contempt of court, into the domain of felonious crimes." "It may not be generally known," adds the judge, "but the power of the court, under the law, in punishing such cases is unlimited in imposing fines or imprisonment," and the persons charged were sentenced as follows: The defendant Higgins, for threatening and cursing the employees, fifteen days' imprisonment; Gordon, for intimidating the employees and throwing stones at them, severely injuring one Roberts, ninety days; Wilson, for displacing a switch and derailing an engine, five months; several others, for taking forcible possession of a switch and track, resisting officers, and threatening the employees, three months.

We have shown above, in § 55, that it is doubtful whether that part of this decision which holds a strike an unlawful conspiracy, merely because made by simultaneous concert, for the purpose of crippling a railroad or its operation, is now law; but, undoubtedly, if the court found that the main object was not to redress a fair

grievance of the strikers themselves, but to control the railway managers in their actions, and force recognition of a labor organization, many of whose members were not even employees of the railway itself, the case is still law; although the extreme difficulty of distinguishing such motives has been fully pointed out before.

The Cœur d'Alene case, already discussed by us in § 64,[5] was also a case where the mining company, plaintiff, was in the hands of a receiver; and the defendants, although claiming to be lawful labor unions, were in fact interfering with the possession and working of the plaintiff's property, and the injunction previously granted was continued. It appears in the opinion that service of the injunction order had been made upon the proprietors of two newspapers, which had led to the report that the public press was muzzled. The court held that such service was not intended to restrain publication of the newspapers. "The courts, with good reason, expect the public press to be conservators of the peace; and whether or not they agree with the law, either as enacted or as construed, that they will in good faith advise its observance until amended or reversed."

In Farmers' Trust Co. *v.* Northern Pacific Railway Co.,[6] more fully discussed in §§ 55, 58, 64,

[5] 51 F. R., 260.

[6] 60 F. R., 803.

Judge Jenkins granted the famous order against the employees of the receiver from so combining and conspiring to quit their service as to cripple the property, or prevent or hinder the operation of the railroad; and against other defendants not employees, but officers of labor organizations, from conspiring to cause a strike upon the railroad, and from ordering or advising others to quit its service. So far as this case was modified by the Circuit Court of Appeals,[7] it would appear that such part of the injunction as forbade employees from striking so as to cripple the railway, etc., and which forbade members of labor organizations not employees from advising them so to do, was annulled. Remembering that the employees were—as Judge Pardee said —*pro hac vice* officers of the court, it may be questioned whether the ruling that a combination of labor organizations, not employees, to persuade them to strike —that is to cease to perform such duties—was a lawful conspiracy, even though the employees themselves might simultaneously leave work or even advise each other to do so. This is, however, both the leading and the latest case upon strikes against receivers, and its elaborate opinion and the voluminous injunction order must be taken to-day to express the law. There is no doubt, however, that

[7] Arthur *v.* Oakes, 63 F. R., 310.

where the property of a railroad or other corporation is being administered by a receiver, it is competent for the court appointing him to adjust difficulties between such receiver and his employees which in the absence of such adjustment would tend to injure the property and defeat the purpose of the receivership; and this principle unquestionably gives the court somewhat greater power in enforcing the contracts of the employees than exists in ordinary cases or with private employers of labor.[8]

So, in Booth *v.* Brown,[9] where the employees of receivers of a railroad have joined in a general strike, without grievance of their own, for the purpose of compelling, by obstruction of travel, parties to one side of a pending controversy to yield actual or supposed rights, Judge Hanford refused to order the reinstatement of such striking employees by the receivers.

§ 66. **Labor Combinations made Unlawful under Recent Federal Statutes.**—In § 64 we discussed the history of remedies by injunction and contempt process, and noted that an injunction could not be granted solely as against a crime unless there were some property or contract right involved. In § 65 we noted the fact of the increased modern practice of putting corpora-

[8] Waterhouse *v.* Comer, 55 F. R., 149. [9] 62 F. R., 794.

tions, and particularly railroads, in the hands of receivers appointed by the federal courts, with the consequence that any interference with the possession or management of the receiver becomes a matter for which contempt process may lie. It remains in this section to note the great extension of equity jurisdiction caused by the recent federal statutes concerning interstate commerce and trusts or combinations. Before these statutes—although undoubtedly the owners of a railway had a property right which would justify the interference of courts of equity in labor disputes in all proper cases—such remedies were not very often sought; and the government as government, and the courts as courts, could not intervene except by the ordinary processes of criminal law, by the police, or, in case of extreme disorder, by militia or troops. The Interstate Commerce act, passed, first, February 4, 1887,[1] and amended March 2, 1889,[2] applied to any common carrier engaged in the transportation of passengers or property, wholly or partly by railroad, to or from one state or territory of the United States to any other state or country; or from any place in the United States through a foreign country to any other place in the United States. In short, it applied to all possi-

[1] U. S. Stats., 1887, Chap. 104.
[2] *Ibid.*, 1889, Chap. 382.

ble transportations of passengers or property except such as were received, transported, and delivered entirely within one state or territory. The object of the statute was, of course, to regulate charges and forbid unreasonable advantages or preferences to special places or persons, and to forbid the pooling of earnings, and to create a permanent national commission for the enforcement of the provisions of the statute. But it had two very important consequences. Section 10 made it a misdemeanor for any person employed to do or suffer any interference with such interstate transportation, and while it was probably intended to apply only to interference by improper exactions, charges, or combinations among the railroad companies, it in fact applied equally to interferences by the railroad employees with the actual transportation or its machinery, and such interference being thereby made criminal, any combination to effect it became, of course, criminal also (see above, §§ 51, 55). Secondly, it put all matters of interstate transportation so expressly under the protection of the United States government as to make possible the application by the courts of equity of the theory that the government itself had a property right in goods the subject of such transportation, which would justify them in granting to it the affirmative protection of the powerful arm of the courts of equity.

But a far more momentous statute in extending the powers of the federal government over labor disputes was the Anti-Trust Act of July 2, 1890.[3] Section 1 of this act expressly provided that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

It is probable that Congress, when it passed this statute, also had in mind only such combinations among employers or purchasers; but the statute made no such limitation, and very probably would not have been held constitutional had it done so. Consequently the words of this section apply equally to all "combinations . . . in restraint of . . . commerce among the several states;" and it is easy to see how the courts were forced to hold that these words would include combinations by laboring men intended to impede or prevent transportation of interstate freight or passengers, especially when read in connection with the words of the Interstate Commerce Act itself. But more, Section 4 provided that "the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several dis-

[3] U. S. Stats. 51st Cong., 1st Sess., Chap. 647.

trict attorneys of the United States, in their respective districts under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations."

"Such proceedings may be by way of petition setting forth the case and praying that such violation shall be *enjoined* or otherwise prohibited."

If there had been any previous doubt, under the Interstate Commerce Act, that the federal government had such a property right in goods the subject of interstate transportation that they could invoke equity jurisdiction to secure the same, such doubt is wholly removed by this section. The circuit courts are especially invested with jurisdiction to prevent any and all violations of the act; and the district attorneys of the United States are expressly charged with the duty of instituting proceedings *in equity* to prevent and restrain such; and, moreover, the statute is precise enough to point out how exactly it may be done, viz., that such proceedings may be by the way of petition setting forth the case and praying that such violation shall be enjoined. And now, the injunction once issued, as the statute requires, the ordinary remedies of contempt process, etc., follow as a matter of course, and there can be no question of their legality, provided only the court had jurisdiction

of the parties, and the Supreme Court of the United States has so decided.[4]

That case of Blindell *v.* Hagan,[5] decided in 1893, granted the injunction against the defendants—a combination of persons who were preventing the plaintiff's ship from getting a crew—upon ordinary equity grounds; but not upon the Anti-Trust Act, holding that this statute does not authorize the bringing of injunction suits in equity by any parties except the government. But the Toledo Railway case [6] held that the third section of the Interstate Commerce Act—providing that it should be unlawful for any common carrier subject to the act to make or give any undue or unreasonable preference, etc., to any particular person or corporation—did justify an injunction against persons so interfering with the business of a private corporation; and that this jurisdiction attaches because of the subject-matter, and without regard to the citizenship of the parties. The same case [7] contains Judge Taft's celebrated decision, in which he awarded an injunction against P. M. Arthur from ordering the engineers to carry out Rule 12 of the Brotherhood of Locomotive Engineers, which rule provided that "when an issue has been sustained by the grand

[4] In re Debs, 64 F. R., 724; 158 U. S., 564.

[5] 54 F. R., 40. See §§ 55, 58, 64.

[6] Toledo Ry. Co. *v.* Pennsylvania Co., 54 F. R., 746.

[7] 54 F. R., 730.

chief . . . it shall be recognized as a violation of obligation for a member of the Brotherhood . . . who may be employed on a railroad running in connection with . . . said road, to handle the property belonging to said railroad or system in any way that may benefit said company in which the B. L. E. is at issue until the grievance is settled." The case also decided that railroad employees engaging in such a boycott of another railroad were guilty of a conspiracy to commit the misdemeanor described in Sec. 10 of the Interstate Commerce Act; and hence if any person engaged in it does an act in furtherance thereof, all combining for the purpose are guilty of criminal conspiracy, as defined by Sec. 5440 Revised Statutes. Both cases held that such mandatory injunctions were binding upon all officers and employees of the defendant having proper notice thereof, whether they were made parties to the bill or not. And the second case goes rather far in holding that employees might be enjoined from quitting service in such a manner as to cause peril to life or injury to property, or to subject the railroad to legal penalties, or to cause irremediable injuries to their employers and the public, and from enforcing rules of labor unions which so result, such as those requiring an arbitrary strike without cause, merely to enforce a boycott against a connecting line. (See § 55.)

In the same year came the case of the United States *v.* Workingmen's Amalgamated Council,[8] in which the Circuit Court for Louisiana awarded an injunction against interference with interstate commerce by a combination of draymen and longshoremen, and held that such rights could be enforced under the Anti-Trust Act, which was definitely held to apply to combinations of laborers as well as capitalists. In the meantime the case of United States *v.* Patterson[9] had been decided to the contrary by the Circuit Court for Massachusetts. Judge Putnam said (and events have since shown that he was correct): "If the proposition made by the United States is taken with its full force, the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute." These anticipations have been more than realized and the conservative ground taken in United States *v.* Patterson has long since been abandoned.

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[8] 54 F. R., 994.

[9] 55 F. R., 605.

In Southern California Railway Co. *v.* Rutherford [10] jurisdiction was taken on the ground of the Interstate Commerce Act, and the interference of the defendants, employees of a railroad company, with interstate commerce and the transmission of mails; and an injunction was issued requiring the employees "to perform all of their regular and accustomed duties so long as they remain in the employment of the company." This case has been already criticised. (See § 6.) Judge Taft, in the Toledo Railroad cases above noted, specially observed that a court of equity could not enforce by mandatory injunction the performance of the labor contract, and if such an injunction as that in this case is now justifiable upon equity principles, it must be only in consequence of the peculiar provisions of the Anti-Trust Law, and is, perhaps, the most striking example of its far-reaching effect. So, in United States *v.* Elliot,[11] Judge Thayer held, in the Missouri Circuit Court, that while it is not ordinarily lawful or expedient for a court of equity to award an injunction to prevent the doing of acts that are in themselves crimes, by Sec. 4 of the Anti-Trust Act the court was expressly given such jurisdiction in cases of a combination to restrain or interfere with interstate commerce; that a combination whose professed

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[10] 62 F. R., 796.

[11] 62 F. R., 801.

object was to arrest the operation of railroads running between states was necessarily such an unlawful conspiracy; and an injunction was granted against the defendants both against doing the acts as threatened, to wit, inducing persons in the employment of said railroad to leave its service, and against preventing them from procuring other operatives, and against issuing orders to the persons in the employ of the several railroad companies to cease from operating their trains; and the latter principle was reaffirmed, and United States *v.* Patterson expressly disapproved, in Thomas *v.* Cincinnati Railway Co.[12]

The principles announced by Judge Ross were further developed by him in a charge to the grand jury a few weeks later,[13] and he also held that a railroad is not obliged under its charter to move trains when the employees refuse to move them because Pullman cars are attached; nor to leave all such cars and run the rest of the train; and where the regular passenger trains have been designated for carrying mail, the failure of a railroad to run other mail trains is not a violation of the statute against obstruction of the mails; that a conspiracy to obstruct

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[12] 62 F. R., 803. See also §§ 55, 58 for further discussion of this case.

[13] June 29, 1894. See In re Grand Jury, 62 F. R., 834.

the mail is an offence against United States law, and that persons inciting rebellion or insurrection against the authority of the United States or the laws thereof may be punished criminally under U. S. R. S. 5334; and he specially called the attention of the grand jury to a report in the newspapers of a speech made by one Doctor Ravlin at a public meeting held on a previous night. This charge is particularly interesting because it covers not only the point of the criminal liability of the laborers, but of the railway company as well, and even of persons who belong to neither, but are engaged in fomenting the disorder.

The case of United States *v.* Agler [14] further reinforces the general interpretation of the Anti-Trust Act, and holds that the injunction issued is binding as against a person not even named in the bill nor served with a subpœna as "one of the unknown defendants referred to in the bill," whenever the injunction order is served upon them. By Baker, J.: "Prior to the Act of 1890, the United States had no power by petition or bill to go into its courts of equity and invoke their aid to prevent interference with the carriage of mails or interstate commerce; prior to that time the sole remedy was on the criminal side of the court. . . . This act enlarged

[14] 62 F. R., 824.

the jurisdiction of the federal courts and authorized them to apply their restraining power for the purpose of checking or arresting all lawless interference with the peaceable and ordinary carriage of mails and conduct of railroad business between the states."

Another instructive charge was that made by Judge Grosscup, in the District Court of Illinois, July 10, 1894.[15] While not so far reaching as that of Judge Ross, it holds that the open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a nature as to defy for the time being the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed; and charges also what is criminal conspiracy: "A corrupt or wrongful agreement between two or more persons, that the employees of railroads carrying the mails and conducting interstate commerce should quit, and that all others should, by threats or violence, be prevented from taking their places," and that two or more leaders of a labor association insisting on demanding such quitting of employment are guilty of criminal conspiracy.

Judge Morrow, in his charge to the grand jury, delivered July 30, 1894,[16] while reaffirming

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[15] In re Charge to Grand Jury, 62 F. R., 828

[16] 62 F. R., 840.

the principle as to conspiracy of employees against the Anti-Trust Act, seems to differ from Judge Ross in holding that the railroad company corporation must keep its line open, and this without regard to the make-up of regular trains; in other words, that they cannot insist upon moving Pullman, mail cars, etc., with them.

The case of Lennon, discussed more fully in § 65, was a case where one railway company sued another for refusing to interchange business and cars with it in consequence of a strike or boycott against it, in the course of which litigation the injunction was issued under which Lennon was held for contempt, and filed his petition for *habeas corpus:* and the court again held that such suits between railroad companies engaged in interstate commerce involved a federal question, without regard to the citizenship of the parties.

The elaborate charge of Judge Woods in the famous case of United States *v.* Debs,[17] reaffirmed the dissent from United States *v.* Patterson, and held that the Anti-Trust Act is not limited by its title, "an act to protect trade and commerce against unlawful restraints and monopolies," to combinations of capital merely, or of a contractual nature; but the words "contract, combination in the form of trust or otherwise, or conspir-

[17] 64 F. R., 724.

acy," include any combination in restraint of trade or commerce, whether by employers, employees, or other persons. This charge contains, perhaps, the most full and elaborate interpretation of this part of the Anti-Trust Act and consideration of authorities, and has been reviewed by the United States Supreme Court;[18] and the more recent decisions seem to add no new principles.[19]

The last case is that of United States *v.* Cassidy,[20] which was an indictment, under Revised Statutes 5440, of some of the strikers in the California Pullman strike of 1894, for conspiracy under the Anti-Trust Act. The charge is most voluminous, covering eighty-two pages of the report, and very interesting for its full discussion of the facts.

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[18] 158 U. S., 564.

[19] United States *v.* Debs, 65 F. R., 210. This was the charge given by Judge Grosscup, the case in 54 F. R. being the charge upon contempt process. For other charges, see 62 F. R., 828; 63 F. R., 436. The latter was a charge against the employers, it having been alleged that some of the railroads fomented the disorder and disturbance of trains, even perhaps the destruction of property, in order to create public sympathy with them against the strike; and this, also, was held to be a conspiracy on their part within the meaning of the interstate law.

[20] 67 F. R., 698.

CHAPTER X

REMEDIES BY ARBITRATION

§ 67. **State Boards of Arbitration.** — State boards of arbitration have been provided in nearly half the states, up to the time of this writing, for the adjustment of grievances and disputes between employers and employees by conciliation or arbitration.[1] There is also a federal statute (see U. S. Laws, 1888, Ch. 1063) applying, however, to railroad and transportation companies only. It was under this statute (§ 6) that President Cleveland appointed the commissioners to investigate the Chicago riots of 1894.

There are three general types of these statutes providing for arbitration of labor disputes by a state board (for private or local boards, see § 68). The prevailing type, judging by the number of states adopting it, is that of the New York law,

[1] Mass., 1886, 263; 1887, 269; 1890, 385; Ct., 1895, 239; N. Y., 1887, 63, 5; N. J., 1892, 137, 6; Pa. Dig., pp. 133, 134; Ohio, 1893, p. 83; Mich., 1889, 238; Ill., 1895, Special Session; Iowa, 1886, 20, 1; Wis., 1895, 364; Kansas, 1886, 28; Cal., 1891, 51; Idaho Con., Art. 13, 7; Wy. Con., Art. 5, 28; 19, 2; Mon. Pol. C., 3330; La., 1894, 139.

though the Massachusetts statute, which is embodied principally in the Ohio, Illinois, Wisconsin, Montana, California, and Louisiana laws, seems to work better in practice. The Pennsylvania method is more peculiar, and is followed only in Iowa and Kansas.

The state board is, in nearly all the states, appointed by the governor, and (except in Wisconsin) confirmed by the Senate, or, in Massachusetts, the Council.[2] In all these states, with the exception of Louisiana, the board consists of three persons. In New York and Connecticut one must be selected from each of the two parties casting the greatest number of votes at the last election for governor, and a third from a *bona-fide* labor organization. But in Massachusetts, Wisconsin, Ohio, California, and Montana no reference is made to politics; but one must be an employer selected from some association representing employers, and one from some labor organization not an employer, and the third to be appointed upon recommendation of the other two, or, if they fail to agree, by the governor. The Louisiana law is the same, except that there are five arbitrators. In Illinois only one must be an employer, and only one other a member of a labor organization, and not more

[2] Mass., 1886, 263, 1; Ct., N. Y., O.; Mich., Wis., Ill., Mon., La., *ib.*

than two of the same political party. In Michigan the governor may appoint any "competent" persons; in New Jersey one must belong to a labor organization. In Pennsylvania the boards of arbitration are practically local — that is, the presiding judges of the Courts of Common Pleas may issue a license for the establishment of such boards within their respective districts; and this is followed in Iowa and Kansas. The board holds office for three years.[3] They may appoint a secretary, who shall keep full records of their proceedings and all documents and testimony forwarded by the local boards of arbitration.[4] Such board or secretary has the power to issue subpœnas, administer oaths, call for and examine books and papers as far as is possessed by courts of record (see also below);[5] the arbitrators and clerk must take and subscribe an oath of office.[6] In other states they appoint one of their own number chairman and one secretary.[7] They must generally establish rules of procedure;[8] and in some states such rules must be approved by the governor and attorney-general or council.[9]

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[3] N. Y., Mich., Mass., O., Ill. One year: Cal. Two years: Ct., Mon., Wis. Fours years: La. Five years: N. J.

[4] Mass., 1888, 261; N. Y., N. J., Ct., Mich., Ill., Mon.

[5] N. Y., Mich, N. J.

[6] N. Y., Ct., Wis., N. J.

[7] O., La., Wis.

[8] Mass, O., Ill., Mon., La., Wis.

[9] Mass., O., Mon., Wis.

But in a few states the functions of the state board of arbitration are filled only by the labor commissioner,[10] and in others there is permission only for private or local arbitration (§ 68).

The usual provision for setting the machinery of the state board of arbitration in motion is set forth in the note.[11]

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[10] Mo., 6354; Col., 1887, 62; N. D., 1890, 46.

[11] (1) By the Massachusetts method: "Whenever any controversy or difference not involving questions which may be the subject of a suit at law or bill in equity exists between an employer, whether an individual or corporation, and his employees, if at the time he employs not less than twenty-five persons (20 in Mon., La.) in the same general line of business in any city or town in the state, the board shall, upon the application of the employer, or of a majority of his employees in the department in which the controversy exists, or their duly authorized agent, or by both parties, containing a concise statement of the grievances complained of, and a promise to continue on in business or at work without any lockout or strike until the decision of said board, which shall be made within three weeks (four weeks in Mon., Wis.; ten days in O., La.) from the date of filing said application, as soon as practicable visit the locality of the dispute and make careful inquiry into the cause thereof, hear all persons interested, and advise the respective parties what, if anything, ought to be done or submitted to by either or both to adjust said dispute." Mass., *ib.*, 3 and 4; 1887, 269; O., *ib.*, 4–7; Mon. Pol. C., 3333–4; Ill., 1895, Spec., §§ 2–3; Wis., 1895, 364, 3–4; Cal., 1891, 51, 2–3; La., *ib.*, 4, 6, and 7.

And when such agent claims to represent a majority of the employees, the board shall satisfy itself that such agent is duly authorized in writing to represent such employees, but the names of the employees giving authority shall be kept

It is too soon as yet to pass judgment on these statutes; and they have of course given

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secret by the board. Mass., *ib.*, 4; O., *ib.*, 6; Mon. Pol. C., 3334; La., *ib.*, 6.

Upon receipt of said application the board shall cause public notice of hearing, except, when both parties join in the application, such notice is not necessary if the parties so desire, though the board may at any stage order public notice. Mass., *ib.*, 4; O., *ib.*, 8; Mon., *ib.*; Ill., *ib.*; La., *ib.*, 8; Wis., *ib.*, 4; Cal., *ib.*, 2.

In Louisiana, when such mediation has failed to bring about an adjustment of differences, or in Massachusetts, Wisconsin, Illinois, California, and Montana, whenever such decision has been made, it shall at once be made public and recorded upon the books of record of the board, and a short statement thereof published in their annual report. Mass., *ib.*, 3; O., *ib.*, 5; Mon., *ib.*, 3335; Ill., *ib.*, 2; La., *ib.*, 5; Wis., *ib.*, 5; Cal., *ib.*, 2.

Should the petitioner or petitioners fail to perform the terms made in their application, the board shall suspend proceedings. O., *ib.*, 8; Mon., *ib.*; La., *ib.*, 8; Wis., *ib.*, 4; Cal., *ib.*, 3.

The board has power to summon as witnesses any operative in the department of business affected, and any person who keeps the record of wages earned therein, and examine such witnesses under oath, and require production of books and papers. O., *ib.*, 9, 1894, p. 373; Mon., *ib.*; Ill., *ib.*, 3; La., *ib.*, 9; Wis., *ib.*, 4.

And the board seems to have a general power to compel the attendance of witnesses or the production of papers. O., *ib.*, 9; La., *ib.*, 9; Wis., *ib.*, 4.

In several states both parties may nominate a person to act as expert for the special investigation, who shall be sworn and paid for his services. Mass., 1890, 385; Mon. Pol. C., 3334; Wis., *ib.*, 4.

In Wisconsin, Ohio, Montana, and Louisiana the mayor of

rise to no reported case at law; their very object being partly to avoid the bonds of legal pre-

any city, or, in Wisconsin, the board of a town or village, or judge of any district (probate, O.) court in a parish (La.), or two county commissioners (Mon.), to whom it is made to appear that a strike or lockout is soon to occur, or has actually occurred, shall at once notify the state board of the fact; and whenever it comes to the knowledge of the state board that such lockout has occurred, it shall act at its own motion. O., *ib.*, 13, 1894, p. 374; Mon., *ib.*, 3337; La., *ib.*, 10; Wis., *ib.*, 8, 9.

Except as above, in Ohio and Louisiana, it does not appear that the board has any power beyond making this written decision public, though it is generally declared to be the duty of the state board to endeavor, by mediation or conciliation, to effect an amicable settlement before a strike or lockout, and to induce the parties to submit the matters in dispute to the state board, in which case it would seem that the board's decision might have the same legal effect as that of an ordinary arbitrament under the law. O., *ib.*, 4; La., *ib.*, 11.

But in the other states such decision is binding, when both parties join in the application, for six months, or until either party has given the other notice in writing of his intention not to be bound by the same at the expiration of sixty days from such notice. Said notice may be given to the employees by posting in the shop or factory. Mass., *ib.*, 6; Ill., *ib.*, 5; Mon., *ib.*, 3336; Wis., *ib.*, 6; Cal., *ib.*, 4.

There is generally a provision for an annual report to the legislature, which, in Ohio and Louisiana, shall include suggestions as to legislation, and statement of the actual workings of the board.

(2) By the New York method, whenever a strike or lockout shall occur, or be threatened, and come to the knowledge of the board, it shall proceed at once to the locality, communicate with the parties, and endeavor to affect an amicable settlement, and may inquire into the cause of the controversy

cedent. The state boards have been far more successful as boards of mediation or conciliation

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with all the ordinary powers. N. Y., 1887, 63, 9; N. J., 1892, 137, 10; Ct., 1895, 239, 4; Mich., 1889, 238, 5; Mo., 6354; see also above for similar provisions in the other states.

Any grievance or dispute may be submitted by the voluntary action of both parties directly to the state board in the first instance.

Such board shall then proceed to the locality and inquire into the cause of the dispute, both parties submitting to it in writing their complaints, and severally agreeing in writing to submit to the decision of the board, and promising to continue work without a lockout or strike until such decision, provided it be rendered within ten days after the completion of the investigation.

After the matter has been fully heard, the board, or a majority, shall within ten days render a written decision, stating such details as will show its nature and the points disposed of. N. Y., *ib.*, 7–8; Ct., *ib.*, 2–3; Mich., *ib.*, 3–4; N. J., *ib.*, 8–9.

Decisions may be rendered by a majority of the board, and a majority shall constitute a quorum. N. Y., *ib.*, 6; N. J., *ib.*, 7.

State Board as Appellate from Local Boards.—In New York and New Jersey the state board holds appeals from decisions in local boards, and its decision is final, the submission to arbitration having in the first instance, of course, been voluntary by both parties.

(3) By the Pennsylvania method the presiding judges of the courts of common pleas (district court in Iowa and Kansas), upon petition, or agreement of the parties, shall issue a license for the establishment within their respective districts (counties, Io.) of tribunals for the settlement of disputes between employers and employees in the iron, steel, glass, textile fabrics, and coal trades, or each of them (in me-

than in arbitrating disputes already well under way, or strikes. Indeed, to their actual arbitra-

chanical, manufacturing, and mining industries, in Iowa and Kansas). Pa. Dig., p. 133, 67; Io., 1886, 20, 1; Kan., 332.

Such petition must be signed by fifty (twenty in Iowa, five in Kansas) employees, employed by five separate firms (four in Iowa, two in Kansas), or at least by five (four in Iowa) employers, each one employing at least ten (five in Iowa) workmen (this clause omitted in Kansas), or by the representatives of the firm (omitted in Kansas), individual, or corporation employing not less than seventy-five men. And the agreement shall be signed by both of said specified numbers and persons: *Provided* that (if a dispute exists at the time the petition is presented, and a suspension of work has happened, or is probable, in Pennsylvania) the judge must require testimony to be taken as to the representative character of said petitioners, and whether they represent the will of at least one-half, or a majority, of each party to the dispute. If not, the license may be denied. Pa., *ib.*, 68; Io., *ib.*, 2; Kan., 333.

The workmen signing the petition must each have been a resident of the judicial district for one year, and engaged in the trade they profess to represent for two years, and be United States citizens. The persons signing as employers must be United States citizens engaged in some branch of the trades before mentioned within such district for at least one year, and employing therein at least ten workmen, each of the class hereinbefore described, and may be a firm, individual, or corporation, and the petition may be verified by the oaths of at least two of the signers, attesting the truth of the facts stated therein, and the qualifications of the signers thereto. Pa., *ib.*, 69.

The umpire shall make his award in writing to the tribunal, stating distinctly his decisions on the subject-matter submitted, and when the award is for a specific sum of money, the umpire shall forward a copy of the same to the clerk of the proper court. Io., *ib.*, 13; Kan., 340.

tion both parties will rarely submit. To compulsory arbitration, as is known, the labor organ-

If the petition is signed by the requisite number of both parties in proper form, and contains the names of the persons to compose the tribunal, being an equal number on each side (and of the umpire mutually chosen—Pa.), the judge shall forthwith issue the license authorizing the existence of such tribunal, and fixing the time and place for the first meeting thereof, which shall be made a record in such judge's court. (Pa., *ib.*, 70; Io., *ib.*, 3; Kan., *ib.*, 3.) If the petition be signed by the requisite number of either party, but not by both, the judge issues his license, conditioned upon the assent of the necessary number of that side which has not signed the petition, which assent shall be in writing, and contain the names of the members of the tribunal and the umpire. But if no such assent is obtained within sixty days from the date of the conditional license, the petition is dismissed. (Pa., *ib.*, 71.)

One such tribunal may be created for each trade above named in each judicial district. They shall continue in existence for one year from date of the license, and may take jurisdiction of any dispute between employers and workmen who shall have petitioned for the tribunal, or have been represented in the petition therefor, or who may submit their disputes in writing to such tribunal for its decision. Vacancies occurring shall be filled by the judge out of the three names presented to him by the members of the tribunal remaining of that class in which the vacancies occur. . . . Disputes occurring in one county may be referred to a tribunal already existing in an adjoining county. The place of umpire shall only be filled by the mutual choice of the whole of the representatives of both employers and workmen constituting the tribunal, and the umpire is only called upon to act after the disagreement in the tribunal by failure during three meetings held and full discussion had. His award is final and conclusive upon such matters only as are submitted to

izations are opposed. The main function of the state board is to advise and direct public

him in writing and signed by the whole of the members of the tribunal, or by parties submitting the same (Pa., *ib.*, 72; Io., *ib.*, 4; Kan., 335), and upon questions affecting the prices of labor. It shall in no case be binding upon either employer or workman, save as they may acquiesce or concur therein after such award. (Pa., *ib.*, 72.)

The tribunal must not consist of less than two employers, or their representatives, and two workmen. The exact number is always inserted in the petition or agreement. They appoint a chairman and secretary by a majority, or by lot, as they prefer. They receive no compensation ($2 a day in Kansas.) The umpire has authority to procure witnesses, etc. Attorneys at law may not (in Pennsylvania and Iowa) appear or take part in any of the proceedings. (Pa., *ib.*, 73, 75; Io., *ib.*, 5–7; Kan., 334, 336, 337.) Before the umpire shall proceed to act, the questions in dispute shall be defined in writing and signed by the members of the tribunal, or a majority of each class thereof, or the parties submitting the same, and such writing shall contain the submission of the decision to the umpire by name, and provide that it shall be final. The umpire is sworn, and must make his award within five or ten days, which award may be made a matter of record in the court, and judgment be entered thereon. (Pa., *ib.*, 75 and 76; Io., *ib.*, 9; Kan., 340.)

(4) In Colorado and North Dakota: If any difference shall arise between any corporation, or person, employing twenty-five or more employees, threatening to result, or resulting, in a strike on the part of such employees, or a lockout on the part of such employer, it shall be the duty of the commissioner, when requested so to do by fifteen or more of said employees, or by the employers, to visit the place of such disturbance, and diligently seek to mediate between such employer and employees. Col., 1887, 62, 9; N. D., 1890, 46, 7.

(5) In Missouri: If a mediation cannot be effected, the

opinion; for actual arbitration, local or private (see § 68), or still better, voluntary boards, created for each emergency, are best.

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commissioner may at his discretion direct the formation of a board of arbitration, to be composed of two employers and two employees engaged in a similar occupation to the one in which the dispute exists, but who are not parties to the dispute, and the commissioner of labor statistics and inspection, who shall be president of the board. The board shall have power to summon and examine witnesses, and hear the matter in dispute, and, within three days after the investigation, render a decision thereon, which shall be published, a copy of which shall be furnished each party in dispute, and shall be final, unless objections are made by either party within five days thereafter: *Provided*, that the only effect of the investigation herein provided for shall be to give the facts leading to such dispute to the public through an unbiased channel.

In no case shall a board of arbitration be formed when work has been discontinued, either by action of the employer or the employees; should, however, a lockout or strike have occurred before the commissioner of labor statistics could be notified, he may order the formation of a board of arbitration upon the resumption of work. Mo., 6355–6358.

(6) Idaho and Wyoming have constitutional provisions. Thus, "the legislature may establish boards of arbitration, whose duty it shall be to hear and determine all differences and controversies between laborers and their employers which may be submitted to them in writing by all the parties. Such boards of arbitration shall possess all the powers and authority, in respect to administering oaths, subpœnaing witnesses, and compelling their attendance, preserving order during the sittings of the board, punishing for contempt, and requiring the production of papers and writings, and all other powers and privileges, in their nature applicable, conferred by law on justices of the peace." Ida. Const., Art. 13, 7.

"The legislature shall establish courts of arbitration, whose

§ 68. **Creation of Private Boards of Arbitration.**—(For state boards of arbitration see § 67.) In a few states statutes have already been passed providing for the creation of private boards of arbitration to settle differences between employers and employees. They are appointed, usually,

(1) One by the employees, or a labor union (if represented, in New York), one by the employers, and they to choose a third.[1]

(2) By any judge or justice of the peace.[2]

(3) Five arbitrators, by mutual consent, two by the employees or their labor organizations, two by the employers, the four to choose a chairman, or the district court if they fail to agree.[3]

(4) They consist, in Maryland, of not less than two nor more than four, one half from each side, and the judge, etc., appointing them. Such board must further be approved by the county judge.[4]

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duty it shall be to hear and determine all differences and controversies between organizations or associations of laborers and their employers, which shall be submitted to them in such manner as the legislature may provide.

"Appeals from decisions of compulsory boards of arbitration shall be allowed to the Supreme Court of the state, and the manner of taking such appeals shall be prescribed by law." Wy. Const., 19, 2; 5, 30.

[1] N. Y., 1887, 63, 1; O., 1893, p. 85, 10; N. J., 1892, 137, 1; Cal., 1891, 81, 1; Con. Pol. C., 3337.

[2] Md., 73.

[3] Tex., 1895, 61, 1; N. J., 1892, 137, 1.

[4] N. J., Tex

(5) The parties to any controversy, as provided in Section 3 of the act (see § 67) may agree upon a board of arbitration, who shall have all the powers which the state board has, and their jurisdiction is exclusive, except that they may ask advice from the state board. Their report shall be filed with the city or town clerk, and a copy forwarded to the state board.[5]

The grievance or matter of dispute must be stated in writing, and signed by the parties to the arbitration.[6]

Pending arbitration, the existing status must not be changed.[7]

The arbitrators shall sign a consent to act, and shall be sworn, shall elect a secretary, and give notice of the time and place of hearing.[8]

The chairman of the arbitrators has power to administer oaths, and issue subpœnas for the production of books and papers, and for the attendance of witnesses to the same extent as courts of record.[9]

After the matter has been fully heard, the arbitrators, or a majority of them, shall, within ten days, render a written decision, giving such

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[5] Mass., 1886, 263, 7; O., 1893, p. 85, 10–11; Mon. Pol. C., 3337–8; Wis., 1895, 364, 7; Cal., 1891, 51.

[6] N. Y., N. J., *ib.*, 2; Tex., *ib.*, 4.

[7] Tex., *ib.*, 4.

[8] N. Y., *ib.*, 2; N. J., *ib.*, 3; Tex., *ib.*, 5.

[9] N. Y., N. J., *ib.*, 3; Tex. *ib.*, 6.

details as will clearly show the nature of the decision and the points disposed of.[10]

And thereupon the powers of such board cease unless similar grievances between the same classes of persons then exist and are referred to it.[11]

Such decision is a settlement of the matter referred,[12] unless an appeal is taken within ten days to the state board of arbitration.[13] The court may, in Texas, enforce it in equity.

But in all cases, if the parties mutually agree that the dispute shall be arbitrated in a mode different from that herein described, such agreement is valid, and the award by either mode of arbitration is final and conclusive.[14]

The determination of the dispute, as above provided, is given as a judgment of the court over which the judge or justice who is a member of the arbitration presides, and execution follows.[15]

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[10] N. Y., *ib.*, 3; N. J., *ib.*, 4.

[11] N. Y., *ib.*, 4; N. J., *ib.*, 5; Tex., *ib.*, 7.

[12] N. Y., N. J., Tex. *ib.*, 4.

[13] N. Y., *ib.*, 6; N. J., *ib.*, 4 and 7.

[14] Md., *ib.*, 4.

[15] Md., *ib.*, 6. "During the pendency of arbitration under this act it shall not be lawful for the employer or receiver party to such arbitration, nor his agent, to discharge the employees parties thereto, except for inefficiency, violation of law, or neglect of duty, or where reduction of force is necessary, nor for the organization representing such employees to

§ 69. **State Labor Bureaus or Commissioners.**—There is in many states also a bureau of labor statistics, or a commissioner or officer whose duty shall be to collect industrial statistics for the state.[1]

In Nebraska the governor is made such commissioner, and in Washington the secretary of state.[2]

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unite in, aid, or abet strikes or boycotts against such employer or receiver." Texas, *ib.*, 7, 8.

"At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid, judgment shall be entered in accordance with said decision, unless during the said ten days either party shall appeal therefrom to the Court of Civil Appeals holding jurisdiction thereof. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided. The determination of said Court of Civil Appeals upon said questions shall be final, and being certified by the clerk of said Court of Civil Appeals, judgment pursuant thereto shall thereupon be entered by said district court." Texas, *ib.*, 11.

[1] N. H., 1893, 48; Ky., 1893, 16; Me., 1887, 69; R. I., 1887, 621; Ct., 2944; N. Y., 1883, 356; Mass., 31, 13; Pa. Dig., p. 1907; Md., 89, 1; O., Vol. 87, p. 150; Ind., 7758; Ill., 79 a, 1, 2; Mich., 1883, 156; 1891, 68; Wis., 1021 b; Minn., 1887, 115; Io., 2439; Kan., 5963; Neb., 39 b, 1; W. Va., 1889, 15; N. C., 1887, 113; Tenn., 299, 1891, 157; Mo., 8215; Cal., 1889, 6, Sup., p. 543; Col., 1887, p. 62; 1893, 37; Ida. Const., 13, 1; Wash. Const., 2, 34; 1895, 85; Utah, 1890, 43, 6; N. D., 123-126; S. D., 1890, 33; Mon. Const., 18, 1; Pol. C., 760.

[2] Neb., 39 b, 1; Wash., 1895, 85.

The commissioner of immigration, labor, and statistics shall perform such duties and receive such compensation as may be prescribed by law.[3]

It is the duty of the bureau of labor statistics, or labor commissioner, also to keep advised generally on the protective industries of the state, make an annual report to the governor, etc., and to inquire into the causes of strikes, lockups, or other disturbances of the relations between employers and employees.[4]

The commissioner is generally given full access to all factories or workshops, mines, or other pleces where workmen are employed.[5]

The commissioner is generally given power to "send for persons and papers" or to take and preserve evidence and examine witnesses under oath.[6]

A commission or bureau on the unemployed has also been created in Massachusetts.[7] And in some states, free state bureaus of employment (see § 47).

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[3] Ida. Const., Art. 13, 8.

[4] Mich., Me., Ind., Minn., Io., Kan., Neb., N. C., Mo., Col., Cal., Ida., Utah, N. D., S. D., Mon.

[5] Me., N. Y., Mich., Wis., Minn., Kan., Neb., Tenn., W. Va., Mo., Cal., Col., Mon., N. D., S. D.

[6] Me.; Mass., 31, 14; Pa.; N. Y.; Ind.; Mich.; O., 309; Wis.; Minn.; Io., 2444; Neb.; Kan.; Tenn.; W. Va.; Mo.; Cal.; Col.; N. D.; S. D.; Mon.

[7] Mass., 1894, 238; compare Utah, 1894, 10.

The powers of such boards are purely investigatory. There is as yet no effort by law for creating a permanent state organism with the function of artificially creating a demand for labor. See § 70.

§ 70. **State Aid to the Unemployed.**—Legislation with the aim of giving direct aid or employment by or through the agency of the state, being in its nature purely socialistic, has not yet been attempted by any of our states. Massachusetts, by a law of 1894[1] appointed a commission on the unemployed, with large powers of inquiry and investigation and a substantial appropriation; and among their recommendations was one that cities or other municipal corporations should anticipate public work in times of distress. The nearest statute to direct appropriation that we find is that of Utah (1894, Ch. 10), which was called "An Act to aid needy laborers," and appropriated $2,000 to be spent by a board of relief specially appointed for that appropriation in labor on capitol grounds. This sum was expended, as appears by a later act of the same year (Ch. 82), which ordered that such $2,000 should be paid by the state treasurer "without regard to other warrants registered in advance;" that is, a preference was given to

[1] Mass., 1894, 238.

this debt over all other debts of the state. Although the amount was small, the principle was a dangerous one and not likely to be followed in the older states. The principles of state socialism have not yet been applied in the law of any American state, unless it be in the South Carolina liquor statute, which, giving the state a monopoly of that business, "nationalizing" the liquor traffic, was for that reason declared unconstitutional by the Supreme Court of that state.[2]

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[2] McCullough *v.* Brown, 41 S. C., 220 (see § 2). This decision was afterward differed from in a later case, the court having been in the meantime reconstituted (State *v.* Aiken, 42 S. C., 223), but only on the ground of police regulation (see § 4).

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